Fordham Law Review

Volume 44 | Issue 1 Article 7

1975

Recent Developments

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Constitutional Law—Social Security Act Granting Benefits to Women Only Violates Equal Protection.—On June 5, 1972, Paula Wiesenfeld died in childbirth, survived by her husband, Stephen, and infant son, Jason. She had worked as a teacher during the seven years preceding her death. During the year and a half of their marriage, Paula's salary, which far exceeded Stephen's, provided the main support for the family.[1] Upon Paula's death, Jason became eligible for child's insurance benefits under the social security law.[2] Stephen obtained these, but was denied other benefits payable to a surviving spouse entrusted with the care of such a child.[3] Only women were entitled to these so-called "mother's benefits."[4] Stephen Wiesenfeld challenged the statute as violative of the equal protection guarantee incorporated into the fifth amendment.[5] A three-judge district court invalidated the statute,[6] and the Supreme Court affirmed without dissent, finding it unnecessary to adopt the lower court's holding that classifications based upon sex are inherently suspect.[7] In its affirmance, the Supreme Court applied the traditional analysis of equal protection challenges, the so-called rational basis test,[8] in a vigorous

1. In 1970 Paula earned $9808; Stephen earned $3100. In 1971 Paula earned $10,686; Stephen $2188. In 1972 Paula earned $6836; Stephen $2475. Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 984 (D.N.J. 1973), aff'd sub nom. Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975).

2. "Every child . . . of an individual who dies a fully or currently insured individual . . . shall be entitled to a child's insurance benefit for each month . . . ." 42 U.S.C. § 402(d) (1970), as amended, (Supp. II, 1972).

3. "The widow and every surviving divorced mother . . . of an individual who died a fully or currently insured individual, if such widow or surviving divorced mother . . . has in her care a child of such individual entitled to a child's insurance benefit, . . . shall . . . be entitled to a mother's insurance benefit . . . ." Id. § 402(g) (1970), as amended, (Supp. II, 1972).

4. A legislator has described the basis of this reasoning: "The income security programs of this nation were designed for a land of male and female stereotypes, a land where all men were breadwinners and all women were wives or widows; where men provided necessary income for their families but women did not; in other words, where all of the men supported all of the women. This view of the world never matched reality, but today it is further than ever from the truth." Griffiths, Sex Discrimination in Income Security Programs, 49 Notre Dame Law. 534 (1974). See generally Walker, Sex Discrimination in Government Benefit Programs, 23 Hastings L.J. 277 (1971); Note, Sex Classifications in the Social Security Benefit Structure, 49 Ind. L.J. 181 (1973).

5. "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " Schneider v. Rusk, 377 U.S. 163, 168 (1964). The federal government is required to meet the same standards as those imposed upon the states by the equal protection clause of the fourteenth amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

6. 367 F. Supp. 981 (D.N.J. 1973).

7. Id. at 990.

8. In McGowan v. Maryland, 366 U.S. 420 (1961), the Court explained this test in a challenge to a state's Sunday closing laws. It said that the fourteenth amendment allows the states—and, by implication, the fifth amendment allows the federal government—wide discretion in enacting laws which establish classifications of individuals. "The constitutional safeguard

manner.[9] *Weinberger v. Wiesenfeld,* 95 S. Ct. 1225 (1975).

Equal protection attacks upon statutes classifying upon the basis of sex reach far back into United States history.[10] In *Muller v. Oregon,*[11] the Supreme Court, finding sex to be a valid classification, upheld a state statute that prohibited the employment of women in a factory or laundry for more

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[equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Id. at 425. In applying this test, the Court said that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Id. at 426; see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1077-87 (1969), which demonstrates that application of this standard rarely resulted in the invalidation of the challenged statute. It has been described as the "traditionally toothless" test. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 18-19 (1972) [hereinafter cited as Gunther]. A more demanding standard of equal protection is the so-called "strict scrutiny" test or the "new equal protection." When either an inherently suspect classification or a fundamental interest is involved, the Court subjects the statute to strict scrutiny, demanding that the state show that the statute serves a compelling interest. See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1087-133 (1969). Use of this strict scrutiny test has usually resulted in the overturning of the challenged law. Gunther, supra at 8. The Burger Court has been unwilling to expand the categories of suspect classifications and fundamental interests. Id. at 12-13.

9. A "newer" equal protection standard has been discerned in the Court's use of the clause "as an interventionist tool without resorting to the strict scrutiny language of the new equal protection." Gunther, supra note 8, at 12; see Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071 (1974); Comment, Equal Protection in Transition: An Analysis & A Proposal, 41 Fordham L. Rev. 605 (1973); Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L.J. 163. The test under this "newer" standard focuses on the means used by the legislature to further its purpose and eliminates the Court's traditional "extreme deference to imaginable supporting facts and conceivable legislative purposes." Gunther, supra note 8, at 21. The test involves "relatively vigorous scrutiny . . . more interventionist than the Warren Court's applications of old equal protection formulas [b]ut . . . considerably less strict than the new [i.e., 'strict scrutiny'] equal protection." Id. For instances of the application of this newer standard see id. at 25-37. See also the concurring opinion of Justice Powell in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651, 653-54 (1974) (overrestrictive maternity leave provisions violate the due process clause of the fourteenth amendment). Justice Powell would have decided the issue on equal protection grounds, seeing no rational relation between the classification of groups of teachers and the school board's interest in continuity of instruction.

10. More than a century ago, Myra Bradwell challenged an Illinois statute that limited the practice of law to males. In Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872), the Court did not consider her appeal under the due process and equal protection clauses of the fourteenth amendment, presumably because of its previous decision in Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872), that these provisions applied solely to discrimination based upon race. The Court upheld the Illinois statute as consistent with "the law of the Creator," stating that the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." Bradwell v. Illinois, supra at 141. The statute did not violate the privileges and immunities clause of the fourteenth amendment because the right to "engage in any and every profession, occupation, or employment in civil life" was not among the privileges and immunities of citizens. Id. at 140.

11. 208 U.S. 412 (1908).

than ten hours a day. It said that a "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . ."[12] and that the physical well-being of women is "an object of public interest."[13] The difference between the sexes, said the Court, "justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."[14] This combination of stereotypes and paternalism has often shown itself in decisions of the Court.[15]

The invalidation of sex-based classifications on equal protection grounds,[16] began with *Reed v. Reed*,[17] in which a unanimous Court overturned an Idaho statute mandating a preference for males over females as administrators of estates.[18] The Court purported to employ the traditional rational basis analysis and looked at the asserted purpose of the statute, namely, the reduction of the work-load of probate courts. This end was deemed to be "not without some legitimacy."[19] The significance of *Reed* lay in the next step of

12. Id. at 421.

13. Id.

14. Id. at 422-23. The Court found it necessary to distinguish its earlier decision invalidating, as a limitation upon the right to contract, a New York law that had set a ten hour daily maximum for all bakery employees. Lochner v. New York, 198 U.S. 45 (1905).

15. In Goesaert v. Cleary, 335 U.S. 464 (1948), the purpose of a Michigan statute prohibiting the licensing of a woman as a bartender unless she was the wife or daughter of the male owner of the bar, was found to be the prevention of "moral and social problems." Id. at 466. The Court did not question the state's belief that the statute was related to this purpose. See Hoyt v. Florida, 368 U.S. 57, 62 (1961) (upholding statute according women an absolute exemption from jury service because of their "special responsibilities" as "the center of home and family life"). But see Taylor v. Louisiana, 419 U.S. 522 (1975). See generally Johnston & Knapp, Sex Discrimination By Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971).

16. The Court has also used a due process analysis to strike down sexual discrimination. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). This analysis, distinct from that of equal protection, will not be treated here. For a thoughtful comparison of the analyses involved in both equal protection and due process, see Johnston, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. Rev. 617, 629-35 (1974).

17. 404 U.S. 71 (1971). Lower federal and state court decisions overturning sexual discrimination helped to change the legal climate. See Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593 (S.D.N.Y. 1970) (invalidated the exclusion of women from a bar); Kirstein v. Rector & Visitors of the Univ. of Va., 309 F. Supp. 184 (E.D. Va. 1970) (invalidated sexually restricted admissions policy at the University of Virginia); Mollere v. Southeastern La. College, 304 F. Supp. 826 (E.D. La. 1969) (invalidated law requiring unmarried women, but not men, under 21 to live in college dormitories); White v. Crook, 251 F. Supp. 401 (M.D. Ala. 1966) (invalidated exclusion of women from jury service); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (declared sex to be a suspect classification; invalidated the exclusion of women from bartending); In re Estate of Legatos, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (3d Dist. 1969) (invalidated a sex-discriminatory inheritance law); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968) (invalidated longer prison sentences for women than for men).

18. "Of several persons claiming and equally entitled to administer [an estate], males must be preferred to females, and relatives of the whole to those of the half blood." Idaho Code § 15-314 (1948). This statute was subsequently repealed. Ch. 111, § 5, [1971] Idaho Sess. Laws.

19. 404 U.S. at 76.

the Court's analysis: instead of focusing most of its inquiry upon the legislative purpose as it had done in the past,[20] the Court examined the rational relation of the means chosen, to the end to be achieved. It held the means arbitrary, not rational, and therefore unconstitutional, but did so in a curt opinion which obscured as much as it illuminated. The Court held that the mandatory preference of males, for the sake of eliminating the necessity of a hearing on the merits, was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . ."[21]

It is evident that *Reed* represents a stricter use of the traditional equal protection analysis, one that emphasizes the efficacy of the means chosen to achieve a valid legislative purpose.[22] Establishing priorities in choosing estate administrators based upon an arguably reasonable assumption that men have more familiarity with financial matters than do women, would seem to further the legitimate purpose of administrative convenience. Arguably the statute was not arbitrary under the traditional rational basis analysis.[23] The Court's brief opinion gave no precise indication of the standard of analysis to be used in subsequent sex discrimination cases.

In *Frontiero v. Richardson,*[24] a plurality of the Court did say that sex was an inherently suspect classification, subject to strict scrutiny. Two federal statutes provided certain dependents' benefits for spouses of members of the armed services. A serviceman could obtain these benefits for his wife without any demonstration of her dependency upon him. A servicewoman, however, could obtain these same benefits for her husband only upon the showing that she contributed more than half of his support.[25] The Court reversed a three-judge district court's determination that the classification by sex was rationally related to the purpose of administrative convenience served by the

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20. See note 8 supra.

21. 404 U.S. at 76. The Court cited F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) (classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.").

22. See note 9 supra.

23. Note, The Emerging Bifurcated Standard for Classifications Based on Sex, 1975 Duke L.J. 163, 173.

24. 411 U.S. 677 (1973), noted in 87 Harv. L. Rev. 116 (1973). The opinion of Justice Brennan was joined by Justices Douglas, White and Marshall. Justice Stewart filed a one sentence concurring statement, agreeing that the statute worked "an invidious discrimination," citing Reed. 411 U.S. at 691. Justice Powell was joined by Chief Justice Burger and Justice Blackmun in a concurring opinion. Id.; see text accompanying notes 31-33 infra. Justice Rehnquist dissented. Id. For an interpretation of the meaning of plurality decisions see Comment, Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis, 24 U. Chi. L. Rev. 99 (1956).

25. See 37 U.S.C. § 401(1), (3) (1970); 10 U.S.C. § 1072(2)(A), (D) (1970). Such benefits include allowances for living quarters, 37 U.S.C. § 403 (1970), as amended, (Supp. III, 1973), and medical care, 10 U.S.C. § 1076 (1970). Compare Jablon v. Secretary of HEW, 44 U.S.L.W. 2066 (D. Md. Aug. 12, 1975) (three-judge district court).

statute.[26] Justice Brennan stated in the plurality opinion that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[27] Administrative convenience was not sufficiently compelling to save the scheme.[28] Justice Brennan found "at least implicit support"[29] in *Reed* for labeling sex-based classifications as inherently suspect, calling that decision a "departure from 'traditional' rational-basis analysis."[30]

Justice Powell concurred, finding the judgment to be "abundantly support-[ed]" by *Reed.*[31] He believed it unnecessary, however, for the Court to declare sex a suspect classification. The process of ratification or rejection of the Equal Rights Amendment[32] to the Constitution influenced Justice Powell. He thought it unwise for the Court to "pre-empt" such a political decision, which he believed would resolve the question.[33]

Frontiero represents the Court's strongest denunciation of sex-based discrimination. Justice Brennan's eloquent rejection of paternalistic discrimination was echoed in his later dissents in *Kahn v. Shevin,*[34] *Geduldig v. Aiello,*[35] and *Schlesinger v. Ballard.*[36] In *Weinberger v. Wiesenfeld,*[37] how-

26. Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972), rev'd sub nom. Frontiero v. Richardson, 411 U.S. 677 (1973).

27. 411 U.S. at 688. Justice Brennan analogized sex discrimination to race discrimination, stating that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." Id. at 685.

28. Id. at 688-91.

29. Id. at 682.

30. Id. at 684.

31. Id. at 692 (concurring opinion).

32. "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Proposed Amend. to the U.S. Const., S.J. Res. 8, S.J. Res. 9, & H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). Some 34 of the required 38 states have at one time ratified this amendment. Subsequently, however, at least one state has revoked its ratification. Should the required total of 38 states be reached, the efficacy of this revocation will have to be determined. For a variety of views on the necessity for, and the implications of, the Equal Rights Amendment see Symposium, Men, Women, and the Constitution: The Equal Rights Amendment, 10 Colum. J. of L. & Soc. Prob. 77 (1973); Equal Rights for Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 215 (1971); Symposium, The Equal Rights Amendment, 1 Human Rights 54 (1971).

33. 411 U.S. at 692 (Powell, J., concurring). See Johnston, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. Rev. 617, 640-42 (1974).

34. 416 U.S. 351, 357-60 (1974) (Brennan, J., dissenting); see notes 46-48 infra and accompanying text.

35. 417 U.S. 484, 497-505 (1974) (Brennan, J., dissenting); see note 57 infra and accompanying text.

36. 419 U.S. 498, 511-21 (1975) (Brennan, J., dissenting); see notes 64-65 infra and accompanying text.

37. 95 S. Ct. 1225 (1975); see notes 66-80 infra and accompanying text.

ever, he has retreated from his outspoken view that sex is a suspect classification and grounded his opinion, joined by a majority of the Court, on a "newer" equal protection analysis.[38]

An equal protection attack upon a sex-based statutory classification was considered in *Kahn v. Shevin*,[39] where a widower challenged a Florida law that provided an annual $500 property tax exemption to widows.[40] The Court affirmed the state court's denial of a declaratory judgment[41] that the statute violated the equal protection clause of the fourteenth amendment. Writing for a six-member majority, Justice Douglas abandoned the strict scrutiny test which he had espoused in joining Justice Brennan's opinion in *Frontiero*.[42] He looked to the purpose of the law and found that it was "to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."[43]

Noting that in matters of taxation, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation,"[44] the Court did not subject the means to more than cursory scrutiny. Instead it held that "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' "[45]

Justice Brennan, joined by Justice Marshall, dissented vigorously, repeating his belief that a standard of strict judicial scrutiny must be applied to a "legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status . . . ."[46] He believed the purpose asserted by the majority—aiding women who had been victims of past economic discrimination—was sufficiently compelling.[47] The statute, however, failed to meet the strict scrutiny test because it was overinclusive, aiding rich as well as poor widows, and underinclusive, aiding only those women who had lost husbands through death. The law would survive Justice Brennan's strict scrutiny only if narrowly drafted to aid women who were actual victims of economic discrimination.[48]

The deviation in *Kahn* from the trend discerned in *Reed* and *Frontiero* of overturning sex discrimination statutes, is perhaps explained by the fact that

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38. See note 9 supra.

39. 416 U.S. 351 (1974), discussed in The Supreme Court, 1973 Term, 88 Harv. L. Rev. 129 (1974).

40. Fla. Stat. Ann. § 196.191(7) (1971), as amended, Fla. Stat. Ann. § 196.202 (Supp. 1975).

41. Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973), aff'd, 416 U.S. 351 (1974).

42. 411 U.S. 677 (1973); see notes 24-30 supra and accompanying text.

43. 416 U.S. at 355.

44. Id., quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973).

45. 416 U.S. at 355, quoting Reed v. Reed, 404 U.S. 71, 76 (1971), quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

46. 416 U.S. at 357 (Brennan, J., dissenting).

47. Id. at 359-60.

48. Id. at 360.

the challenged statute had a benign effect upon a class traditionally the victim of discrimination.[49] The Florida statute is an example of reverse discrimination, a subject with which the Court has not yet dealt directly.[50] *Weinberger v. Wiesenfeld*[51] now makes it clear, however, that the recital of a benign purpose will not save such a statute from attack. The fact that the action involved the state taxing power may be of significance. *Kahn,* rather than being an indication of the Court retreating from its course of more closely examining the means used to achieve the purpose of a statute, may simply be a case in which the exceptional fact situation does not warrant such an analysis.

After *Kahn,* the Court twice rejected equal protection attacks on statutes that singled out women for special treatment. In *Geduldig v. Aiello,*[52] the Court upheld California's exclusion of disabilities related to normal pregnancies from its insurance program which provided income maintenance to those persons unable to work because of disabilities.[53] There was a question here as to whether the exclusion of a disability that affected only women was in fact sex-based and discriminatory. Justice Stewart's opinion for a six-member majority[54] said that it was not. Two classes were found to have been set up, "pregnant women and nonpregnant persons. While the first is exclusively female, the second includes members of both sexes."[55] Thus, there was no sex discrimination. The exclusion of pregnancy related disabilities served the legitimate state purpose of maintaining a self-supporting program.[56]

In his dissent, Justice Brennan used the strict scrutiny analysis and found that the "singling out for less favorable treatment a gender-linked disability peculiar to women . . . created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex . . . ."[57]

Such a statute may be based upon the cultural assumptions that woman's role is childbearing, and that her husband will provide her support during this time. There is also a feeling that pregnancy is a voluntary condition,

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49. The Supreme Court, 1973 Term, 88 Harv. L. Rev. 129, 133 & n.33.

50. See DeFunis v. Odegaard, 416 U.S. 312 (1974); Johnston, Sex Discrimination and the Supreme Court—1971-1974, 49 N.Y.U.L. Rev. 617, 663-64 (1974).

51. 95 S. Ct. 1225, 1233 (1975).

52. 417 U.S. 484 (1974).

53. The lower court had held that exclusion of disabilities resulting from normal and abnormal pregnancies violated equal protection. Aiello v. Hansen, 359 F. Supp. 792, 801 (N.D. Cal. 1973). Because California subsequently changed its law to provide coverage for abnormal pregnancies, the Court held that question to be moot and limited its decision to normal pregnancies. 417 U.S. at 492.

54. The decision was joined by Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist. Justice Brennan filed a dissent in which Justices Douglas and Marshall joined.

55. 417 U.S. at 497 n.20.

56. Id. at 496-97.

57. Id. at 501 (Brennan, J., dissenting).

somehow less deserving of consideration. In the case at issue, it is noteworthy that California provided compensation for disabilities such as cosmetic plastic surgery and sterilization, surely no less voluntary than pregnancy. The effect that this "voluntariness" argument would have on the value of *Aiello* remains unclear.[58]

Another statute that purported to favor women was attacked as a violation of equal protection in *Schlesinger v. Ballard*.[59] The Navy allowed women line officers a tenure of thirteen years before mandatory discharge for want of promotion.[60] Male line officers, however, were discharged upon twice being passed over for promotion, regardless of the length of their tenure.[61] The plaintiff, a male, had served only nine years when he became subject to mandatory discharge.

Justice Stewart, writing for the majority, examined the legislative history of the statute in much the same way that Justice Brennan was to do two months later in *Wiesenfeld*. He reasoned that restrictions on female line officers' participation in combat and most sea duty gave them less of an opportunity to compile the impressive service record needed for promotion. The congressional intent was to provide these women with "equitable career advancement programs."[62] This was a valid legislative goal, found to be furthered by the means. The Court's determination that this was the purpose of the statute was supported by the fact that in navy programs in which men and women were similarly situated, such as staff officer programs, Congress made no tenure distinctions.[63]

Justice Brennan again dissented, repeating his belief formulated in *Frontiero* that sex is a suspect classification. This was a position from which he was soon to retreat in *Wiesenfeld*. The retreat was perhaps foreshadowed in

58. The Third Circuit, in a decision involving the denial of pregnancy benefits in a private disability plan, has recently rejected voluntariness as a justification for different treatment of pregnancy. The court pointed out that many activities such as "[d]rinking intoxicating beverages, smoking, skiing, handball and tennis," are voluntary and involve the possibility of physical harm, but this resulting harm is not excluded from disability coverage. Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975), cert. granted, 95 S. Ct. 1989 (1975). The Court also pointed out that the lack of 100% effectiveness of any contraceptive device, the possibility of health complications in their use and the conflict between their use and certain religious convictions, all militate against any presumption of voluntariness. Id. The Fourth Circuit has also recently held that the denial of disability benefits for pregnancy is violative of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1)(1970). Gilbert v. General Elec. Co., No. 74-1557 (4th Cir. June 27, 1975). These decisions distinguish Aiello by stating that although the denial of pregnancy benefits is not an "involuntary discrimination" denying equal protection, it is a discrimination based on sex in violation of the guidelines promulgated by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964. See Communication Workers v. A.T. & T. Co., 513 F.2d 1024 (2d Cir. 1975), reversing and remanding 379 F. Supp. 679 (S.D.N.Y. 1974), which had said that such discrimination did not violate Title VII.

59. 419 U.S. 498 (1975).

60. 10 U.S.C. § 6401(a) (1970).

61. Id. § 6382(a) (1970).

62. 419 U.S. at 508.

63. Id. at 509.

his following the majority's lead and examining legislative history, finding it "replete with indications of a decision *not* to give women any special advantage."[64] He then pointed out the logical flaw in the majority's position, which was that women line officers do not compete with men for promotion. Their lack of combat and sea duty would thus in no way disadvantage them.[65]

In *Weinberger v. Wiesenfeld,*[66] the Court also addressed a statute that purported to favor women. Section 402(g) of the social security law[67] provided a "mother's benefit" upon the assumption that the death or disability of a father resulted in a loss of earnings for the family.[68] The same assumption, however, did not run in favor of the family of an employed mother, whose compulsory contribution to the system resulted in less protection for her family. If she died or became disabled, her husband received no benefits to compensate for the loss of her salary or to provide for the homemaking and childcare services she contributed.

In writing for the Court,[69] Justice Brennan seemed to have abandoned his former insistence upon strict scrutiny of gender-based classifications, although he cited *Frontiero* as the basis of the decision. His analysis of the statute followed the model of a "newer equal protection" standard discerned by commentators.[70]

The opinion limits *Kahn,* stating that the "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[71]

The purpose of the classification advanced by the government was the compensation of women beneficiaries for the economic difficulties they faced in seeking to support themselves and their families.[72] The Court refused to accept this purpose without question. Instead, it investigated the legislative history[73] and found that the aim of section 402(g) was "to provide children

64. Id. at 516 (Brennan, J., dissenting).

65. Id. at 518 (Brennan, J., dissenting).

66. 95 S. Ct. 1225 (1975).

67. See note 3 supra for the pertinent portion of the text of the statute.

68. See 95 S. Ct. at 1231 n.13; P. Booth, Social Security in America 30 & n.5 (1973).

69. Justices Stewart, White, Marshall, and Blackmun joined in the opinion of the Court. Justice Powell also filed a concurring opinion in which Chief Justice Burger joined. Justice Rehnquist filed an opinion concurring in the result. Justice Douglas took no part.

70. See note 9 supra. This test has been termed "strict rationality." The Supreme Court, 1972 Term, 87 Harv. L. Rev. 1, 123 (1973).

71. 95 S. Ct. at 1233. The Court also noted that the statute involved in Frontiero gave the servicewoman the opportunity to prove her husband's dependency. The social security statute, however, was "more pernicious," establishing an irrebutable presumption against the widower. See Note, The Irrebutable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

72. 95 S. Ct. at 1233.

73. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Id. at 1233 n.16.

deprived of one parent with the opportunity for the personal attention of the other."[74] Looking at the relation of the statute to that purpose, the Court found the gender-based distinction "entirely irrational" because the "classification discriminates among surviving children solely on the basis of the sex of the surviving parent," a result which "makes no sense."[75]

The Court also said that the gender-based distinction was gratuitous.[76] The benefits granted to women under section 402(g) were inversely proportional to their earnings. If indeed the stereotype of men as breadwinners is valid, then few men would receive section 402(g) benefits. Only those men in need, that is, only those similarly situated to the women the law already aids, would receive the benefits.[77]

The Court concluded that the sex-based classification could not be said to have provided for the special needs of women. As such, the classification violated the due process clause of the fifth amendment.[78]

The decision is important in that this law had more far-reaching effects on American society than the laws overturned in *Reed* and *Frontiero*.[79] It is probable that the Court, in former days, would have found any number of valid legislative purposes adequately served by section 402(g).[80] The Court has not, in *Weinberger v. Wiesenfeld,* declared by a majority that sex is a suspect classification. It has, however, shown itself willing and able to invalidate certain types of sex discrimination by applying the traditional equal protection rational basis standard with a greater degree of vigor than in the past.

Rosemary T. Levine

Criminal Law—Narcotics—District of Columbia Circuit Holds Severe Penalty Provision of the Controlled Substances Act Inapplicable to Registered Physician.—Doctor Thomas W. Moore, a licensed physician registered under the Controlled Substances Act[1] to prescribe and dispense methadone (a schedule II controlled substance[2]) for detoxification purposes,

74. Id. at 1233. The Court, citing the Final Report of the Advisory Council on Social Security 31 (1938), found that purpose explicitly stated to be "enabling the widow to remain at home and care for the children." Id. at 1233-34.

75. Id. at 1235. The Court also noted the father's right to the custody of his child, Stanley v. Illinois, 405 U.S. 645 (1972), with which section 402(g) interfered. 95 S. Ct. at 1235.

76. 95 S. Ct. at 1236.

77. Id.

78. Id.

79. It is estimated that it will cost the government $20 million to provide the benefits for men as well as for women. N.Y. Times, Mar. 23, 1975, § 4, at 16, col. 1.

80. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1079-81 and cases cited in n.16 (1969).

1. 21 U.S.C. §§ 801-904 (1970) (originally enacted as Act of Oct. 27, 1970, Pub. L. No. 91-513, §§ 101-709, 84 Stat. 1242).

2. 21 U.S.C. § 812(c) (Schedule II(b)(11)) (1970); see note 43 infra.

was tried and convicted[3] in the United States District Court for the District of Columbia on twenty-two counts for the knowing and unlawful distribution and dispensation of that narcotic drug—a violation of the primary felony provision, section 841,[4] of the Act. The conditions at Dr. Moore's office and his manner of prescribing drugs violated legitimate professional standards. The doctor employed armed guards and kept a handgun on his desk. Upon a patient's arrival, a nurse administered a cursory examination and requested an unsupervised urine specimen. When the patient finally saw Dr. Moore and asked for a methadone prescription, the doctor informed him that the cost of a prescription was proportionate to the number of pills requested. Dr. Moore generally did not inquire about the dosage that his patients were consuming nor did he give instructions as to the use of the pills. Moreover, Dr. Moore still would prescribe the pills to patients even though a urinalysis showed no use of narcotics. Many witnesses testified that they could get a "cheap high" through Dr. Moore because the cost of these prescriptions was cheaper than the price of heroin on the street.[5]

On appeal, the United States Court of Appeals for the District of Columbia, though assuming the doctor "acted wrongfully,"[6] held section 841 inapplicable to a registered physician,[7] reversed the conviction,[8] and declined to discuss whether he "could lawfully administer a methadone maintenance

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3. United States v. Moore, 505 F.2d 426, 445-46 (D.C. Cir. 1974), cert. granted, 420 U.S. 924 (1975) (MacKinnon, J., dissenting). The sentences were concurrent prison terms of five to fifteen years on fourteen of the counts and ten to thirty years on the remaining, to run concurrently with each other but consecutively to the first sentence. The court also imposed fines totalling $150,000 and revoked his license to practice medicine pursuant to D.C. Code Encycl. Ann. § 2-131 (1966). Id.

4. 21 U.S.C. § 841 (1970). The section provides in pertinent part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to . . . distribute, or dispense . . . a controlled substance . . . ." Id. at (a)(1).

The penalties for violation of this section provide in part: "Except as otherwise provided in section 845 of this title, any person who violates subsection (a) . . . shall be sentenced as follows:

"In the case of a controlled substance in schedule I or II . . . , such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both." Id. at (b)(1)(A).

5. United States v. Moore, 505 F.2d 426, 446-47 (D.C. Cir. 1974) (MacKinnon, J., dissenting), cert. granted, 95 S. Ct. 1116 (1975).

6. Id. at 429.

7. Id. at 427. Contra, United States v. Rosenberg, 515 F.2d 190, 200 (9th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3603 (U.S. May 13, 1975) (No. 74-1367); United States v. Green, 511 F.2d 1062, 1067 (7th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3540 (U.S. March 29, 1975) (No. 74-1233). The importance of this issue should not be underestimated for many states tend to model their drug legislation after the federal laws in order to effectuate efficient control of narcotics. More than thirty states have passed the Uniform Controlled Substances Act, or a variation thereof. See, e.g., Ill. Ann. Stat. ch. 56, §§ 1100-1603 (Smith-Hurd Supp. 1975); Mass. Ann. Laws ch. 94c, §§ 1-48 (1975); Nev. Rev. Stat. §§ 453.011-.361 (1973); N.M. Stat. Ann. §§ 54-11-1 to 54-11-39 (Supp. 1973); Wash. Rev. Code Ann. §§ 69.50.101-608 (Supp. 1974). Although New York did not pass the act, its law does take into account the federal law. See N.Y. Penal Law § 220.00 -.60 (McKinney Supp. 1974).

8. 505 F.2d at 427.

program."[9] *United States v. Moore,* 505 F.2d 426 (D.C. Cir. 1974), *cert. granted,* 420 U.S. 924 (1975).

Congress first attempted to control drugs and drug traffic with the enactment of the Harrison Act[10] in 1914. Originally designed as a tax measure, its primary purpose was to bring "the domestic traffic in narcotics into the open under a licensing system, so that the sloppy dispensing practices of the day could be checked."[11] Thus, the Act was not intended to interfere with the medical treatment of drug addicts. An explicit statutory exemption was provided for the reputable physician prescribing and dispensing narcotics in his good faith professional practice.[12]

9. Id. at 429. There are generally two systems used in treating addicts with methadone—maintenance and detoxification. Under a proper maintenance approach, methadone is administered in daily doses of ten to twenty mg. with increases until stabilization is achieved, resulting in a condition of "blockade." This "blockade" prevents heroin from entering into the receptors in the human body because they are filled with methadone. As a result, an addict will not experience any euphoria if other narcotic drugs are ingested. The process is administered under supervision in a clinic in order to prevent the drug from getting into the community, for methadone, itself, is a narcotic.

Detoxification, a less controversial approach, involves a process whereby a patient receives increasing doses of methadone until the dosage necessary to prevent withdrawal symptoms is found. Once this level has been reached the patient's dosage is decreased gradually until he is detoxified and can abstain from drugs.

A person seeking such assistance must receive a thorough physical examination. See DeLong, Treatment and Rehabilitation, in Dealing with Drug Abuse 173 (1972); Cazalas & Bucaro, Methadone Maintenance Blockade Treatment: A Solution for Addiction, 16 Loyola L. Rev. 1, 5-6 (1970); Note, Methadone Maintenance for Heroin Addicts, 78 Yale L.J. 1175, 1175-91 (1969). See also Whitford, The Physician, the Law, and the Drug Abuser, 119 U. Pa. L. Rev. 933, 954-58 (1971).

Speaking of the procedure employed by Dr. Moore in his methadone maintenance and detoxification program, the dissent stated: "[T]he . . . evidence conclusively demonstrates that [his] . . . treatment was not 'consistent with any method . . . throughout the United States that is accepted by the medical profession in this country.' . . . [His] fee arrangement of increasing prices for a prescription based solely on the number of dolophines prescribed . . . [is] 'not only not acceptable medical practice . . . [but] is unethical medical practice.' " 505 F.2d at 447-48 (MacKinnon, J., dissenting).

10. Act of Dec. 17, 1914, ch. 1, 38 Stat. 785 (repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. III, § 1101(b)(3)(A), 84 Stat. 1292).

11. King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736, 737 (1953). See generally Comment, Control of Amphetamine Prescription and Production: Critical Analysis of Federal, State and Local Efforts to Control Amphetamine Abuse, 8 Colum. J.L. & Soc. Prob. 401, 410-11 (1972); Note, Methadone Maintenance for Heroin Addicts, 78 Yale L.J. 1175, 1195 (1969).

12. " '[I]t shall be unlawful for any person to sell . . . the aforesaid drugs except in pursuance of a written order . . . on a form to be issued . . . by the Commissioner of Internal Revenue. . . . Nothing contained in this section shall apply—(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this Act in the course of his professional practice only: Provided, That such physician . . . shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed . . . except such as may be dispensed or distributed to a patient upon whom such physician . . . shall personally attend . . . .' " Act of Dec. 17, 1914, ch. 1, 38 Stat. 786.

Early cases decided under the Harrison Act, however, assumed that the physicians were not prescribing narcotics to cure drug addiction, but were administering the drugs merely to satisfy the cravings of an addict.[13] The quantity prescribed[14] and the superficial examinations given[15] generally were considered sufficient evidence of bad faith and thus disqualified physicians from the exemption.[16] Doctors were treated as pushers and convicted of violating the Act.[17]

A different situation arose in *United States v. Behrman.*[18] The indictment charged that Dr. Behrman gave a derivative of opium to one who did not require the drug "by reason of any disease other than such addiction . . . ."[19] No charge was made that the doctor was not acting in good faith to cure the addiction. On the basis of quantity alone,[20] the Court found that the doctor had violated the Act, thereby extending the rationale of the former cases beyond what some Justices believed to be the intent of the Act.[21]

These decisions left physicians in a precarious position for it seemed that

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13. See, e.g., Jin Fuey Moy v. United States, 254 U.S. 189, 193 (1920), overruled on other grounds, Funk v. United States, 290 U.S. 371 (1933); Webb v. United States, 249 U.S. 96, 98 (1919); United States v. Doremus, 249 U.S. 86, 90 (1919).

14. Jin Fuey Moy v. United States, 254 U.S. 189, 193 (1920), overruled on other grounds, Funk v. United States, 290 U.S. 371 (1933) (prescriptions calling for large quantities of morphine); Webb v. United States, 249 U.S. 96, 98 (1919) (doctor furnishing over 4,000 prescriptions).

15. 254 U.S. at 193.

16. "Manifestly the phrases 'to a patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician . . . strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer . . . to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it." Id. at 194.

17. In Webb v. United States, 249 U.S. 96 (1919), the Sixth Circuit had certified to the Supreme Court the question:

" 'If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of § 2?' " Id. at 99.

The Court decided: "[T]o call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion . . . is required." Id. at 99-100.

18. 258 U.S. 280 (1922).

19. Id. at 286.

20. Over three thousand doses were dispensed. Id. at 289.

21. "The defendant was a licensed physician and his part in the sale was the giving of prescriptions for the drugs. . . . [I]t must be assumed that he gave them in the regular course of his practice and in good faith.

". . . It seems to me impossible to construe the statute as tacitly making such acts, however foolish, crimes, by saying that what is in form a prescription and is given honestly in the course of a doctor's practice, . . . is not within the words, is not a prescription and is not given in the course of practice, if the Court deems the doctor's faith in his patient manifestly unwarranted." Id. at 290 (Holmes, J., dissenting).

"[a]ny doctor who prescribed any narcotic to any addict could be threatened with prosecution . . . and good faith was no defense."[22] As a result, the medical profession refused to treat addicts and the United States acquired the reputation as the best market for illicit narcotics.[23]

This intolerable situation could not last indefinitely. The Supreme Court, in *Linder v. United States*,[24] attempted to clarify the rights of physicians to prescribe and dispense drugs in a manner which would not violate the federal law. In an indictment almost identical to that in *Behrman*,[25] the doctor was charged with violating the Act. This time, however, the amount prescribed was one tablet of morphine and three tablets of cocaine.[26] The indictment did not question the doctor's good faith medical purpose nor the propriety of his actions in accordance with proper standards of medical practice.[27] It merely asserted that the act of dispensing the drugs to a known addict, even a minute quantity, was sufficient to constitute an offense.[28] The Court reversed the doctor's conviction holding that the Harrison Act did not legislate the method for treating addicts, especially where a physician prescribes a small quantity of drugs[29] and does so in good faith. The Court thereby repudiated the earlier test[30] and referring to the *Behrman* case said: "This opinion related to definitely alleged facts and must be so understood. The enormous quantity of drugs ordered . . . seemed enough . . . to exclude the idea of *bona fide* professional action in the ordinary course."[31] Thus, *Linder* implies that a physician must meet a dual test in order to qualify for the Harrison Act exemption—good faith medical purpose and accordance with generally accepted medical standards.[32]

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22. King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736, 744 (1953); see, e.g., Simmons v. United States, 300 F. 321 (6th Cir. 1924) (physician's giving 4,095 prescriptions calling for 79,592 grains of morphine within 9 months creates conclusive presumption of bad faith); Hobart v. United States, 299 F. 784 (6th Cir. 1924) (per curiam) (doctor's prescribing of large quantities of morphine at frequent intervals eliminated good faith defense); Manning v. United States, 287 F. 800 (8th Cir. 1923) (physician's good faith question for jury).

23. See King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736, 744-45 (1953).

24. 268 U.S. 5 (1925).

25. 258 U.S. 280 (1922).

26. 268 U.S. at 16.

27. Id. at 17.

28. Id. at 16-17.

29. "[The Act] says nothing of 'addicts' and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances." Id. at 18.

30. See notes 14-17 supra and accompanying text.

31. 268 U.S. at 22.

32. For a discussion and criticism of the Supreme Court's interpretation of the Harrison Act

Circuit courts, however, experienced great difficulty in applying the guidelines of the Supreme Court and it became virtually impossible to distinguish which tests the courts were using. Frequently, the mere prescription of drugs to addicts resulted in indictments of doctors on the basis of the fact that they were maintaining rather than curing addiction and therefore lacked the good faith necessary for the Harrison Act exemption.[33] Legislation was therefore necessary to alleviate the confusion caused by the conflicting judicial interpretations.[34]

Aware of the growing menace of drug abuse in the United States,[35] Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970[36] in order to, *inter alia,* "strengthen existing law enforcement authority in the field of drug abuse . . . ."[37] Title II of the Controlled Substances Act[38] has as its primary purpose the enforcement of the Act.

The Act requires annual registration of every person in the legitimate chain of drug distribution.[39] The Attorney General is directed to register an applicant to distribute a controlled substance unless he determines that such registration would be inconsistent with the public safety.[40] If a practitioner already is authorized to dispense controlled substances under the law of the State in which he practices, then such registration is pro forma.[41] Those

vis-à-vis physicians, see King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736, 739-48 (1953).

33. See, e.g., United States v. Bloom, 164 F.2d 556 (2d Cir. 1947), cert. denied, 333 U.S. 857 (1948); United States v. Brandenburg, 155 F.2d 110 (3d Cir. 1946), cert. denied, 332 U.S. 769 (1947); United States v. Abdallah, 149 F.2d 219 (2d Cir.), cert. denied, 326 U.S. 724 (1945); Boehm v. United States, 21 F.2d 283 (8th Cir. 1927). See Note, Methadone Maintenance for Heroin Addicts, 78 Yale L.J. 1175, 1202-03 n.112 (1969) for an analysis of circuit courts' criteria. See also White v. United States, 399 F.2d 813 (8th Cir. 1968); Brown v. United States, 250 F.2d 745 (5th Cir.), cert. denied, 356 U.S. 938 (1958).

34. The confusion surrounding a physician's liability for treating narcotic addicts led the Prettyman Commission to report: "Since the passage of the Harrison Act of 1914, the Federal narcotics laws have expressly permitted a physician to prescribe narcotic drugs for a patient in the course of 'professional practice only' and for 'legitimate medical uses' and 'legitimate medical purposes.' Under this statutory language there is no doubt that a physician may prescribe narcotic drugs for a patient suffering acute pain or from a painful and incurable disease. But a controversy has existed for 50 years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.

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"The practicing physician has thus been confused as to when he may prescribe narcotic drugs for an addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients." H.R. Rep. No. 1444 (Pt. I), 91st Cong., 2d Sess. 14-15 (1970) [hereinafter cited as House Report].

35. One indication of the upsurge in drug abuse was that from 1960 to 1968, arrests for drug violations increased by 322 percent. House Report, supra note 34, at 6.

36. 21 U.S.C. §§ 801-966 (1970).

37. House Report, supra note 34, at 1.

38. 21 U.S.C. §§ 801-904 (1970).

39. Id. § 822(a).

40. Id. § 823(b).

41. Id. § 823(f).

persons registered are required to keep detailed records[42] with all drugs subject to control divided into five schedules, according to their potential for abuse and actual medical value.[43] Furthermore, the Act provides severe criminal penalties for engaging in illicit traffic,[44] especially in activities which constitute a continuing criminal enterprise[45] or distribution to a minor.[46] Properly registered physicians are permitted to distribute, dispense and prescribe certain controlled substances and those who violate registration restrictions are subject to less severe penalty provisions.[47] The overall scheme of the criminal sanctions imposed for violation of the Act reflects a sentencing procedure that is intended to give maximum flexibility to judges, enabling them to consider the attendant circumstances of each individual case—that is, to differentiate the casual violator from the hardened criminal.[48] In essence, the Act aims at deterring the trafficker, and not the abuser.[49]

Finally, the Attorney General is authorized to promulgate rules and regulations with respect to the distribution and dispensing of controlled substances.[50]

After implementation of the Controlled Substances Act, circuit courts had

42. Id. § 827. "The bill is designed to improve the administration and regulation of the manufacturing, distribution, and dispensing of controlled substances by providing for a 'closed' system of drug distribution for legitimate handlers of such drugs. Such a closed system should significantly reduce the widespread diversion of these drugs out of legitimate channels into the illicit market, while at the same time providing the legitimate drug industry with a unified approach to narcotic and dangerous drug control." House Report, supra note 34, at 6.

43. See 21 U.S.C. § 812(b) (1970). See generally McLaughlin, A Nation Tranquilized—A Socio-Legal Analysis of the Abuse of Sedatives in the United States, 42 Fordham L. Rev. 725, 753-54 (1974); Comment, Control of Amphetamine Prescription and Production: Critical Analysis of Federal, State and Local Efforts to Control Amphetamine Abuse, 8 Colum. J.L. & Soc. Prob. 401, 413-14 (1972).

44. 21 U.S.C. § 841(b)(1) (1970); see note 3 supra.

45. 21 U.S.C. § 848(a) (1970).

46. Id. § 845.

47. Id. §§ 842, 843 (1970). Section 842(a) provides in pertinent part: "It shall be unlawful for any person—(1) who is subject to the requirements . . . to distribute or dispense a controlled substance in violation of section 829 of this title . . . ." The penalty for violation is provided in § 842(c): "[A]ny person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. . . .

"If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall . . . be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both."

Section 843(a) reads: "It shall be unlawful for any person knowingly or intentionally—(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title . . . ." The penalty for violation is provided in § 843(c): "Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both . . . ."

48. House Report, supra note 34, at 11.

49. Compare 21 U.S.C. §§ 841-43 (1970) (penalties for dispensing narcotics), with § 844 (1970) (penalties for possessing narcotics).

50. 21 U.S.C. § 821 (1970). See generally Whitford, The Physician, the Law, and the Drug Abuser, 119 U. Pa. L. Rev. 933, 951-54 (1971).

little difficulty in affirming convictions of physicians indicted under section 841[51] when they issued prescriptions which could not be viewed as a legitimate part of medical practice.[52] Some doctors were dispensing drugs without giving physical examinations[53] and even advising patients to get the prescriptions filled at different pharmacies to avoid the spot checks made by the Bureau of Narcotics and Dangerous Drugs.[54] Such abuse led one court to conclude:

> [A] licensed practitioner is not immune from the act solely due to his status, . . . but rather, because he is expected to prescribe or dispense drugs within the bounds of his professional practice of medicine. A physician is restricted to dispensing or prescribing drugs in the bona fide treatment of a patient's disease, including a dispensing of a moderate amount of drugs to a known addict in a good-faith attempt to treat the addiction or to relieve conditions or suffering incident to addiction. . . . However, under the guise of treatment a physician cannot sell drugs to a dealer nor distribute drugs intended to cater to cravings of an addict. . . . Congress did not intend for doctors to become drug "pushers."[55]

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51. 21 U.S.C. § 841 (1970); see note 3 supra.

52. See United States v. Larson, 507 F.2d 385 (9th Cir. 1974) (per curiam); United States v. Badia, 490 F.2d 296 (1st Cir. 1973) (per curiam); United States v. Bartee, 479 F.2d 484 (10th Cir. 1973); United States v. Collier, 478 F.2d 268 (5th Cir. 1973).

In United States v. Leigh, 487 F.2d 206 (5th Cir. 1973), the court affirmed the dismissal of an indictment because it charged the physician with distributing rather than dispensing. However, it did permit the return of a proper indictment if one was considered justified. 487 F.2d at 208. This interpretation seemingly conflicts with a prior Fifth Circuit decision, United States v. Collier, 478 F.2d 268 (5th Cir. 1973), where the court affirmed a physician's plea of guilty to unlawfully "distributing" controlled substances in violation of section 841.

The First Circuit, on the other hand, has held explicitly that a registered physician may be charged only with "distributing" since, in its view, the statute defines "dispensing" as a lawful act when done by a person registered under the statute. Noting that its interpretation conflicted with the recent decision of the Fifth Circuit in Leigh, the court stated: "We think the reason Congress included the term 'dispense' in § 841(a)(1) was to compel physicians to become properly licensed. If not licensed, a physician could then be convicted of unlawful dispensing. However, once licensed, he could not be convicted of unlawful dispensing because, as we stated above, the statute defines the term in and of itself as a lawful act." United States v. Badia, 490 F.2d 296, 298 n.4 (1st Cir. 1973) (per curiam).

53. 490 F.2d at 297-98.

54. United States v. Bartee, 479 F.2d 484, 486 (10th Cir. 1973); accord, United States v. Larson, 507 F.2d 385 (9th Cir. 1974) (per curiam). "Many of the factors considered significant in Bartee are present here. (1) Larson did prescribe and/or distribute inordinate quantities to the individuals named in the various counts. (2) He wrote more than one prescription on occasions in order to 'spread' them out. (3) He charged a flat rate cash fee for each prescription. (4) Dr. Larson cautioned the witness . . . about having the prescription filled at the same pharmacy because each prescription was for a thirty day supply and he was supplying [the witness] with prescriptions more frequently than that. . . . (5) Dr. Larson also used the street parlance for seconal: 'reds'; and for methamphetamine: 'speed'. . . ." Id. at 387-88 (citations omitted).

55. United States v. Collier, 478 F.2d 268, 271-72 (5th Cir. 1973); accord, United States v. Bartee, 479 F.2d 484, 488 (10th Cir. 1973). Both courts relied primarily upon the standards as announced in the cases arising under the Harrison Act. See notes 10-34 supra and accompanying text. See also United States v. Warren, 453 F.2d 738 (2d Cir.), cert. denied, 406 U.S. 944 (1972).

This language became the standard for judging what would be considered in the usual course of a physician's professional practice and was adopted throughout the circuits.[56] Therefore, although physicians are permitted to dispense narcotic drugs under the Act, the statutory definitions of "dispense"[57] and "practitioner"[58] were limited to delivery of controlled substances only in the course of professional practice and once a physician acted otherwise, he was subject to section 841 sanctions.[59]

It is interesting to note that the cases affirmed convictions under the primary felony provision[60] of the Controlled Substances Act, without discussion of possible immunity of physicians from section 841.[61] No courts considered sections 842 and 843[62] to be the only provisions of the act applicable to registered doctors. This inadequate statutory construction led the District of Columbia Circuit Court in *United States v. Moore*[63] to reverse the doctor's conviction under section 841.[64]

In holding the severe penalty provision of the Controlled Substances Act inapplicable to a registered physician, the court reached its conclusion

> by force of the established principle that "when [a] choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[65]

The majority, in its opinion, found that the legislative history of the Act mitigated against the idea that the severe penalty provision should be applied to a registrant because section 822(b)[66] permits such registrants to dispense

56. See note 52 supra.

57. 21 U.S.C. § 802(10) (1970) reads: "The term 'dispense' means to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practioner [sic], including the prescribing and administering of a controlled substance . . . for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to an ultimate user . . . ."

58. Id. § 802(20) (1970) reads: "The term 'practitioner' means a physician . . . licensed, registered, or otherwise permitted . . . to distribute [or] dispense . . . a controlled substance in the course of professional practice . . . ."

59. United States v. Badia, 490 F.2d 296, 298-99 (1st Cir. 1973) (per curiam).

60. 21 U.S.C. § 841 (1970); see note 3 supra.

61. See, e.g., United States v. Larson, 507 F.2d 385 (9th Cir. 1974) (per curiam); United States v. Badia, 490 F.2d 296 (1st Cir. 1973) (per curiam).

62. 21 U.S.C. §§ 842, 843 (1970); see note 47 supra.

63. United States v. Moore, 505 F.2d 426 (D.C. Cir. 1974), cert. granted, 420 U.S. 524 (1975).

64. 21 U.S.C. § 841 (1970); see note 3 supra.

65. 505 F.2d at 427, quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952). The court did state, however, that it could not choose the less harsh alternative if the statutory purpose of the Act was evident. Id. See United States v. Brown, 333 U.S. 18, 25-26 (1948).

66. 21 U.S.C. § 822(b) (1970) provides: "Persons registered by the Attorney General under this subchapter to . . . distribute, or dispense controlled substances are authorized to . . . distribute, or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter."

controlled substances and the "language echoes the 'except as authorized' language of § 841, suggesting immunity for registrants from the [severe] penal sanctions . . . ."[67] Furthermore, the bill passed by the Senate[68] did not contain a section comparable to section 822(b). The House Committee on Interstate and Foreign Commerce added it[69] in order "to make it clear that persons registered under this title are authorized to deal in . . . controlled substances."[70] According to the court, this statement indicates that the severe penalty provision does not apply to such registrants.[71]

The court buttressed its analysis by noting the overall position of section 841 in the scheme of the Act. Violations of sections 828[72] and 829,[73] requiring proper forms and prescriptions for the distribution or prescription of drugs, are backed up by the penalties provided in sections 842 and 843.[74] These sections specifically mention "registrants" whereas section 841 does not. Therefore, this suggests that Congress intended to deal with registrants through administrative controls—sections 842 and 843—reserving the severe penalty provision for those who seek to avoid regulation by not registering.[75]

What the majority found most convincing, however, was the fact that the Controlled Substances Act contained three separate penalty provisions[76] in contrast to the single penalty provision of the Harrison Act.[77] The provisions, originally considered by the Senate,[78] separated the penalty sections so that the severe one would apply to traffickers[79] and the others to those in the legitimate drug trade.[80] Therefore, once a physician has been registered, the

67. 505 F.2d at 429. The court did admit that the language could suggest that "Congress did not intend authorization for registrants to extend beyond compliance with the other provisions of the Act and the regulations promulgated . . . ." However, it discounted this interpretation. Id.

68. S. 3246, 91st Cong., 2d Sess. (1970), reproduced at 116 Cong. Rec. 1671 (1970).

69. House Report, supra note 34, at 38.

70. Id. The standards and procedures for revoking an individual's registration have recently been strengthened by the Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281, §§ 3, 4, 88 Stat. 124, amending 21 U.S.C. §§ 823, 824 (1970) (codified as 21 U.S.C.A. §§ 823(g), 824(a,d) (1974)).

Section 823(g) provides: "Practitioners who dispense narcotic drugs to individuals for maintenance treatment or detoxification treatment shall obtain annually a separate registration for that purpose."

Section 824(a) provides: "A registration pursuant to section 823(g) of this title to dispense a narcotic drug for maintenance treatment or detoxification treatment may be suspended or revoked by the Attorney General upon a finding that the registrant has failed to comply with any standard referred to in section 823(g) of this title."

71. 505 F.2d at 430.

72. 21 U.S.C. § 828 (1970).

73. Id. § 829.

74. See note 47 supra.

75. 505 F.2d at 430.

76. 21 U.S.C. §§ 841-43 (1970); see notes 3, 47 supra.

77. 505 F.2d at 431. See note 12 supra and accompanying text.

78. S. 3246, 91st Cong., 2d Sess. (1970), reproduced at 116 Cong. Rec. 1671 (1970). The relevant portions are §§ 501-03 and are now embodied in 21 U.S.C. §§ 841-43 (1970).

79. S. Rep. No. 613, 91st Cong., 1st Sess. 8 (1969).

80. Id. at 9. See 505 F.2d at 432-33.

only provisions applicable to him for any violation are the modest penalty provisions of sections 842 and 843 which enforce a system of administrative controls.[81]

In a vehement dissent,[82] Judge MacKinnon questioned: "What sanction then, does the law impose on this drug pusher masquerading in the honorable profession of medicine?"[83] To him, since the Act is replete with provisions that a registered physician must act in accordance with accepted medical practice,[84] the "except as authorized" proviso in section 841 must be construed to mean that when "the conduct of a registrant violates this authorized standard [*viz.*, dispensation of controlled substances in accordance with accepted medical practice] he excludes his acts from the exception of section [841] and makes himself subject to its penalties"[85] because he then falls into the category of *any person*[86] and enjoys no such immunity.[87] The lesser penalty provisions of sections 842 and 843 are only intended to cover "[more] or less technical violations"[88] of procedural requirements and not the substantive

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81. 505 F.2d at 430. With respect to prior decisions discussed in notes 52-61 supra and accompanying text, the court said: "[Those courts] . . . never considered the effect of § 822, providing for the registration of dispensing physicians . . . . As we respond to a line of reasoning which was not explored in any of these cases, we do not consider them persuasive authority." 505 F.2d at 434 n.44.

82. Id. at 444-45 (MacKinnon, J., dissenting). "The majority today reverses the conviction of a medical doctor, clearly proven to be a drug pusher (trafficker), on the ground that he was prosecuted under the wrong section of the Controlled Substances Act. They reach this result despite the fact that the section is aimed at drug pushers and 'traffickers,' which Dr. Moore clearly was. The majority holds that the authorization of a doctor to dispense controlled substances for legitimate medical purposes absolutely immunizes him from prosecution under section . . . 841 . . . even when he dispenses narcotic drugs clearly for illegitimate purposes. The majority thus holds that Congress intended to exempt trafficking doctors, merely because they were doctors, from the penalities applicable to other traffickers. The fatal defect in this holding is the failure to recognize that the provision of section [841] which excepts authorized conduct does not create a special class of persons immune from prosecution for trafficking; rather, it recognizes the legality of the acts and conduct of a physician when he dispenses a narcotic drug in good faith for a legitimate medical purpose consistent with the terms of his registration under the Act." Id.

83. Id. at 448 (MacKinnon, J., dissenting).

84. See, e.g., 21 U.S.C. § 802(20) (1970) (" 'practitioner' means a physician . . . registered . . . to . . . dispense . . . a controlled substance in the course of professional practice . . . ."); Id. § 827(c)(1)(A) (excepting registrants from the requirement of making certain records and reports with respect to schedule II, III, IV, or V narcotics prescribed or administered "by a practitioner in the lawful course of his professional practice"); id. § 828(e) ("unlawful for any person to obtain . . . controlled substances for any purpose other than their . . . dispensing . . . in the course of his professional practice . . . ."). See also 21 C.F.R. § 1306.04(a) (1974) ("[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice").

85. 505 F.2d at 451-52 (MacKinnon, J., dissenting).

86. 21 U.S.C. § 841(a)(1) (1970) provides: "[I]t shall be unlawful for any person . . . (1) to . . . distribute, or dispense . . . a controlled substance . . . ."; see note 3 supra.

87. 505 F.2d at 450 (MacKinnon, J., dissenting).

88. House Report, supra note 34, at 10.

conduct of a registrant.[89] "In short, . . . the [appropriate] penalty [was made to] fit the crime"[90] and Dr. Moore was nothing more than "a drug pusher, a trafficker in illegal narcotics."[91]

Subsequent to the *Moore* decision, other circuits consistently have upheld the conviction of registered physicians under the severe penalty provision of the Controlled Substances Act, thereby expressly repudiating the *Moore* rationale.[92] These courts have been concerned with the anomaly that would result if physicians were immunized completely from prosecution under section 841. Since registration for the most part is pro forma,[93] the physician would be able to "stand on [any] street corner and sell prescriptions to passersby"[94] with impunity because he would not be *writing* prescriptions but personally delivering controlled substances. This difference lies in the fact that sections 842 and 843 are triggered by a violation of section 829 which requires a written prescription "[e]xcept when dispensed directly by a practitioner . . . to an ultimate user . . . ."[95] Thus no prescription would mean no violation and if registrants were not subject to section 841, they would be immune from federal prosecution.[96] "To leave the federal government powerless to act against such persons would be to 'override common sense' . . . ."[97]

The courts also have been reluctant to reject the precedent established by the Harrison Act as the *Moore* majority did.[98] Though the form of the statute has changed, the substance has remained[99] and physicians, acting without a legitimate medical purpose by allowing the bearers of their prescriptions to obtain controlled substances "should be treated like . . . any streetcorner pill-pusher."[100] Thus, once a doctor acts beyond the course of professional practice, he is no longer considered a practitioner[101] under the Act and not

89. 505 F.2d at 453 (MacKinnon, J., dissenting).

90. Id. at 455 (MacKinnon, J., dissenting).

91. Id. at 448 (MacKinnon, J., dissenting). Even the Senate has recognized this situation as it noted during consideration of the Narcotic Addict Treatment Act of 1974, note 70 supra. See S. Rep. No. 192, 93d Cong., 1st Sess. 7 (1973).

92. See United States v. Rosenberg, 515 F.2d 190, 195-96 (9th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3603 (U.S. May 13, 1975) (No. 74-1367); United States v. Green, 511 F.2d 1062, 1067-69 (7th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3540 (U.S. March 29, 1975) (No. 74-1233); cf. United States v. Carroll, No. 74-1938 (6th Cir., June 12, 1975); United States v. Black, 512 F.2d 864 (9th Cir. 1975).

93. See notes 40-41 supra and accompanying text.

94. United States v. Rosenberg, 515 F.2d 190, 194 (9th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3603 (U.S. May 13, 1975) (No. 74-1367).

95. 21 U.S.C. § 829 (1970).

96. 515 F.2d at 195.

97. Id. at 194.

98. See notes 76-81 supra and accompanying text.

99. United States v. Rosenberg, 515 F.2d 190, 193-94 (9th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3603 (U.S. May 13, 1975) (No. 74-1367); United States v. Green, 511 F.2d 1062, 1068-69 (7th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3540 (U.S. March 29, 1975) (No. 74-1233).

100. United States v. Green, 511 F.2d 1062, 1067 (7th Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3540 (U.S. March 29, 1975) (No. 74-1233).

101. See note 58 supra.

authorized to prescribe controlled substances.[102] To hold otherwise would be in derogation of congressional intent for:

> The congressional purpose behind section 841 was to get the drug dealer *no matter who he might be,* and to prevent diversion of legitimately produced controlled substances into illicit channels. One of the major sources of this illicit diversion is from registrants who have relatively easy access to controlled substances. Certainly Congress did not intend to immunize such individuals from prosecution under section 841.[103]

Undoubtedly the consequences of a conviction under section 841 of the Controlled Substances Act are extremely severe.[104] However, a vast quantity of narcotics which are produced legitimately and intended to be used for proper medical treatment finds its way into illicit channels.[105] The doctor, himself, is sought out by the drug companies because "he is in a unique economic position; he tells the consumer what to buy."[106] It is extremely easy for an unscrupulous physician in this position, armed with his medical degree and prescription pad, to sell narcotics for profit. The Comprehensive Drug Abuse Prevention and Control Act militates against such an idea because Congress sought to attack the illegal traffic in drugs "with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made *too dangerous* to be attractive."[107] The only completely effective way to achieve this goal is to render *any person,* regardless of status, who deals in such illicit traffic subject to the felony provision of the Controlled Substances Act.

John T. Aragona

Labor Law—Supreme Court Holds That Labor Unions Are Not Exempt from Antitrust Statutes.—Local 100, the respondent union, represented plumbers and mechanical tradesmen of the Dallas area for collective bargaining purposes. It entered into a collective bargaining agreement with the Mechanical Contractors Association of Dallas, a multi-employer bargaining unit

102. 515 F.2d at 193.

103. 511 F.2d at 1069 (emphasis added).

104. Besides the heavy fine and imprisonment imposed by the section, see note 3 supra, a physician may also have his license to practice medicine revoked. See, e.g., D.C. Code Encycl. Ann. § 2-131 (1966) (conviction of a felony in the United States District Court for the District of Columbia may result in revocation of a physician's license without further hearing or procedure); Ill. Ann. Stat. ch. 91, § 16a (Smith-Hurd Supp. 1975) (conviction of a felony in state of federal court may result in a revocation of a license to practice medicine).

105. See House Report, supra note 34, at 7; J. Martin, T. Quinn & J. McCahey, Methadone Diversion, A Study in Five Cities 1-37 (1974); J. Pekkanen, The American Connection 211-12 (1973).

106. J. Pekkanen, The American Connection 89 (1973).

107. House Report, supra note 34, at 9 (emphasis added).

comprising some seventy-five local mechanical contractors.[1] This agreement contained a "most favored nation" clause[2] which provided that if the union granted a more favorable contract to another subcontractor it would make these same terms available to all members of the Association.

Petitioner Connell Construction Company, a general contractor, did not do any plumbing or mechanical work itself, but subcontracted such work to both union and non-union subcontractors. Connell itself was a union contractor whose employees were represented by a number of unions. Local 100 neither represented, nor sought to represent, any of petitioner's employees.

In 1970, Connell refused to sign an agreement with Local 100 which provided, in part, that it would do business only with those mechanical subcontractors who were parties to collective bargaining agreements with the union,[3] and as a result, Local 100 picketed one of Connell's major construction sites halting construction.[4] The petitioner yielded to this pressure and signed the agreement, but

1. The Supreme Court has had little difficulty in dealing with any question of the legality of the multi-employer bargaining unit. In United Mine Workers v. Pennington, 381 U.S. 657, 664 (1965), the Court found "it beyond question that a union may conclude a wage agreement with [a] multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers." See Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 713 (1965); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 275-79 (1955) [hereinafter cited as Cox].

2. The concept of the "most favored nation" clause comes from the jargon of international trade agreements. Essentially, it means that any party to an agreement is entitled to participate in a beneficial rate plan. See Kurt S. Adler, Inc. v. United States, 343 F. Supp. 943, 947 (Cust. Ct. 1972), aff'd, 496 F.2d 1220 (C.C.P.A. 1974) (explaining most favored nation principle).

One commentator has been concerned with antitrust problems which might arise when such a clause is included in a labor agreement. "Prohibition of 'most favored nation' and related clauses seems a sound initial step. . . . These are devices by which employer consent to the terms of a collective agreement is conditioned upon union imposition of identical terms on competitors or by which the union binds itself contractually to impose such terms on others. . . . They can serve, after all, as more than an agreement between a union and an employer, for they may also be a signal to competing employers as to what is intended and as to the security arrangements contemplated." Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 71 (1963) [hereinafter cited as Winter].

3. The agreement, (quoted in full in Connell Constr. Co. v. Plumbers Local 100, 95 S. Ct. 1830, 1834 (1975)) indicated that it was made in accordance with section 8(e) of the Labor-Management Relations Act, 29 U.S.C. § 158(e) (1970), and that neither party was seeking to have the union represent Connell's employees. It applied only to work which Connell normally subcontracted and not to tasks performed by Connell's own employees.

In a previous case, a similar agreement resulted in a loss of business to a non-union subcontractor who sought injunctive relief. On a fact pattern much like Connell, the Seventh Circuit found for the union and stated: "It thus appears that for the construction industry, Congress has approved such contracts as the one now before us." Suburban Tile Center, Inc. v. Rockford Bldg. Council, 354 F.2d 1, 3 (7th Cir. 1965), cert. denied, 384 U.S. 960 (1966).

4. Consequently, the picketing was a secondary activity and outside the collective bargaining context. This was noted by the dissent in Connell. "The picketing at Connell's construction site was therefore secondary activity, subject to detailed and comprehensive regulation pursuant to § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), and § 303 of the Labor

sought injunctive relief and invalidation of the agreement[5] claiming that it violated the Sherman Act.[6] Finding for the respondent, the district court concluded that section 8(e) of the National Labor Relations Act (NLRA),[7] by its terms, authorized the agreement.[8] The Fifth Circuit affirmed for somewhat different reasons. It refused to rule on the section 8(e) question on the grounds that the National Labor Relations Board (NLRB) should interpret that section.[9] Rather, the court found that the union was acting alone[10] and for a legitimate union interest[11] and was therefore exempt from the antitrust laws. The Supreme Court reversed,[12] holding that the agreement neither came within the nonstatu-

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Management Relations Act, 29 U.S.C. § 187." Connell Constr. Co. v. Plumbers Local 100, 95 S. Ct. 1830, 1843 (1975) (Stewart, J., dissenting).

"The element of 'secondary activity' is introduced when there is a refusal to have dealings with one who has dealings with the offending person." Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 271 (1959). The Connell Court majority addressed the effect of this 'secondary' nature of the union's activity. "In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market." 95 S. Ct. at 1837. But see note 8 infra.

5. The action was originally brought in state court but was removed to federal court by respondent. Connell Constr. Co. v. Plumbers Local 100, 78 L.R.R.M. 3012 (N.D. Tex. 1971).

6. The Sherman Act renders illegal and criminal "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . ." 15 U.S.C. § 1 (1970).

7. "Section 8(e) was part of a legislative program designed to plug technical loopholes in § 8(b)(4)'s general prohibition of secondary activities." 95 S. Ct. at 1838; see Local 1976, Carpenters v. NLRB, 357 U.S. 93 (1958). Section 8(e) provides: "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ." 29 U.S.C. § 158(e) (1970) (emphasis omitted).

8. 78 L.R.R.M. at 3014. This court also found that picketing to secure such an agreement was not an illegal secondary activity. Id.; see Construction Laborers Local 383 v. NLRB, 323 F.2d 422, 426 (9th Cir. 1963); Cuneo v. United Bhd. of Carpenters, 207 F. Supp. 932, 938-39 (D.N.J. 1962).

9. Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1174 (5th Cir. 1973), rev'd in part, 95 S. Ct. 1830 (1975).

10. Id. at 1165-66.

11. Id. at 1167.

12. The Supreme Court affirmed both lower courts when it held that state antitrust laws were preempted and could not be applied to this case. "Congress and this Court have carefully tailored the [federal] antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. . . . State antitrust laws generally have not been subjected to this process of accommodation." 95 S. Ct. at 1842 (citation omitted); see Motor Coach Employees v. Lockridge, 403 U.S. 274, 285-91 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246 (1959).

tory antitrust exemption for organized labor,[13] nor within labor's statutory exemption from the federal antitrust laws.[14] The Court concluded that the agreement involved substantial anticompetitive effects that were not the direct result of the elimination of competition over wages and conditions of employment and was thus subject to the federal antitrust laws. *Connell Construction Co. v. Plumbers Local 100*, 95 S. Ct. 1830 (1975).

By reason of a series of acts passed by Congress[15] and interpreted by the Supreme Court,[16] labor unions have enjoyed a partial exemption from the antitrust laws. In its decisions, the Supreme Court has attempted to effect the expressed desire of Congress.[17] It has encountered difficulty, however, because Congress has espoused two views.

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[18]

The reconciliation has been a long and difficult process.[19] Early cases held that the Sherman Antitrust Act of 1890 applied to labor unions.[20] The application of antitrust laws to labor organizations was limited somewhat in 1914 when Congress passed the Clayton Act,[21] which exempted labor union activities in pursuit of legitimate objectives[22] from coverage under the an-

13. Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689-90 (1965).

14. See note 7 supra.

15. Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1970), as amended, 15 U.S.C.A. §§ 1, 2 (Feb. Supp. 1975); Clayton Act § 6, 15 U.S.C. § 17 (1970); Clayton Act § 20, 29 U.S.C. § 52 (1970); Norris-La Guardia Act, Id. §§ 104, 105, 113 (1970); National Labor Relations Act (Wagner Act), Id. § 151 et seq. (1970), as amended, 29 U.S.C.A. § 158(d), (g) (Supp. 1975); see Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 700-09 (1965).

16. E.g., Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (applying Hutcheson test); Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945) (conspiracy with non-union group covered by antitrust laws); United States v. Hutcheson, 312 U.S. 219 (1941) (created broad self-interest test); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (labor unions immune unless there is actual effect or intent to affect commerce); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (very narrow construction which limited Clayton Act); Loewe v. Lawlor, 208 U.S. 274 (1908) (Sherman Act applied to labor unions).

17. See, e.g., 79 Cong. Rec. 10259 (1935) (Conference Report on the Wagner Act).

18. Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 806 (1945); see 483 F.2d at 1161-62 (discussion of same problem); Willis, In Defense of the Court: Accommodation of the Conflicting National Policies, Labor and the Antitrust Laws, 22 Mercer L. Rev. 561 (1971).

19. See notes 15 & 16 supra.

20. E.g., Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 438 (1911); Loewe v. Lawlor, 208 U.S. 274, 302 (1908); Irving v. Neal, 209 F. 471, 476 (S.D.N.Y. 1913); United States v. Debs, 64 F. 724, 755 (C.C.N.D. Ill. 1894), aff'd on other grounds, 158 U.S. 564 (1895). "Prior to the enactment of the Clayton Act in 1914, the Supreme Court treated the Sherman Act as a broad prohibition of activities by combinations of workers which have the effect of restricting interstate commerce." E. Dodd, The Supreme Court and Organized Labor 30 (1946) (footnotes omitted).

21. 15 U.S.C. § 17 (1970); 29 U.S.C. § 52 (1970).

22. See, e.g., United States v. Employing Lathers Ass'n, 212 F.2d 726, 729-30 (7th Cir. 1954)

titrust laws.[23] However, subsequent decisions of the Court permitted only a narrow application of this exemption.[24] In *Duplex Printing Press Co. v. Deering,*[25] the Court found that the protection of the Clayton Act extended only to those activities carried on within the context of an employer-employee relationship.[26] Responding to these decisions, Congress passed the Norris-La Guardia Act which provided that the injunction could not be used in labor disputes to curtail the peaceful activities of organized labor.[27] The Act specifically addressed itself to the holding in *Duplex,* stating that the exemption applied "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[28]

(combination of union and employer in restraint of trade not "a legitimate labor activity"); I.P.C. Distrib., Inc. v. Moving Picture Mach. Operators Local 110, 132 F. Supp. 294, 299 (N.D. Ill. 1955) (union attempt to determine nature of employer's movie showings not a legitimate object); notes 37-39 infra and accompanying text.

23. 15 U.S.C. § 17 (1970).

24. See, e.g., Anderson v. Shipowners Ass'n, 272 U.S. 359, 363 (1926); American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 202 (1921); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 469-71 (1921); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203, 207-08 (E.D. Pa. 1929). Considering the judicial disarming of the Clayton Act, one commentator has stated: "We may also lay aside the cases interpreting sections 6 and 20 of the Clayton Act. Section 6 proved empty because it was inapplicable to concerted activities in organization and collective bargaining. Section 20 afforded immunity [only] to the immediate employees of an employer when engaged in peaceful and lawful activities during a dispute concerning terms or conditions of employment . . . ." Cox, supra note 1, at 257 (footnote omitted). Another commentator observed that "[i]n Duplex . . . and subsequent cases the Court practically nullified §§ 6 and 20 of the Clayton Act by interpretation, achieving that result with respect to § 20 by a very narrow construction of the words 'in any case between an employer and employees.' " E. Dodd, The Supreme Court and Organized Labor 30 (1946) (emphasis & footnote omitted).

25. 254 U.S. 443 (1921).

26. Id. at 469-71.

27. "No court of the United States . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute . . . ." 29 U.S.C. § 101 (1970). In addition, the Act specifically prohibits the courts from issuing antitrust injunctions against labor unions or their members in pursuit of goals and activities described in the Act. Id. §§ 102-05, 113 (1970). "The underlying aim of the Norris-La Guardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." United States v. Hutcheson, 312 U.S. 219, 235-36 (1941). This statement is supported generally by remarks of Senator Norris while presenting his "anti-injunction bill" to the Senate. "The hardship and the injustice brought about by the issuing of injunctions by Federal judges in labor disputes have been the subject of discussion for a number of years. The evils arising from such injunctions have been universally recognized. A public sentiment for relief through these years has gradually grown until the universal opinion of the patriotic people has crystallized into a demand for legislative relief." 75 Cong. Rec. 4502 (1932).

28. 29 U.S.C. § 113(c) (1970). Assessing the impact of the Norris-La Guardia Act on the Duplex decision, Professor Morris has observed: "The Duplex decision, permitting injunctive relief against a secondary boycott, was thus repudiated [via Norris-La Guardia]." C. Morris, The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 808 (1971) (emphasis omitted).

In 1940, the Court, in *Apex Hosiery Co. v. Leader,*[29] established a new test based upon effect on commercial competition,[30] holding that union activity would not come within the Sherman Act unless it was "intended to have, or in fact [had] . . . effects on the market."[31] This test represented a change from previous holdings.[32] It had relatively little application, however, "[s]ince the law took a still different turn before the Court could apply its new test."[33]

Only one year later, in *United States v. Hutcheson,*[34] the Court decided that:

> So long as [the] union act[ed] in its self-interest and [did] not combine with non-labor groups, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[35]

Hutcheson's self-interest test was interpreted initially by the Supreme Court to include anything that would inure to the benefit of the union.[36] Self-interest has since been interpreted to mean anything that comes within the scope of the legitimate objects of labor[37] or anything concerned with a labor dispute.[38] These

29. 310 U.S. 469 (1940).

30. Cox, supra note 1, at 262-64.

31. 310 U.S. at 512. In Apex, the Court considered whether a strike which interfered only minimally with interstate commerce was a violation of the Sherman Act. The Court held: "Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough [to bring the conduct under the Sherman Act], unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." Id. at 500-01; see Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U.S. 37 (1927); United States v. Carrozzo, 37 F. Supp. 191 (N.D. Ill.), aff'd sub nom. United States v. International Hod Carriers, 313 U.S. 539 (1941).

32. Prior to 1940, the courts had applied a number of tests to determine whether union activities were proscribed by the Sherman Act. One such test was based upon the applicability of the commerce clause. Local 66, United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); UMW v. Coronado Coal Co., 259 U.S. 344 (1922). Another test was based on the interpretation of the Clayton Act. See cases cited at note 24 supra. A third test concerned what conduct by a union would constitute the requisite restriction of trade or commerce. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Debs, 64 F. 724 (C.C.N.D. Ill. 1894), aff'd on other grounds, 158 U.S. 564 (1895). For a discussion of these tests see Cox, supra note 1, at 256-62.

33. Cox, supra note 1, at 263.

34. 312 U.S. 219 (1941).

35. Id. at 232 (footnote omitted). This language of the Hutcheson Court has been quoted continually in explanation of its holding. E.g., Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 706 (1965); Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1161 (5th Cir. 1973); 93 Cong. Rec. 3652 (1947); E. Dodd, The Supreme Court and Organized Labor 31 (1946); Cox, supra note 1, at 265.

36. See, e.g., Hunt v. Crumboch, 325 U.S. 821, 825 (1945).

37. "The 'self-interest' of a union and its members has been treated as synonymous with 'the legitimate objects' of organized labor." Republic Prods., Inc. v. Federation of Musicians, 245 F. Supp. 475, 481 (S.D.N.Y. 1965). The "legitimate objects" phrasing undoubtedly came from

apparent limitations, however, have not significantly restricted the broad reaches of self-interest.[39] Unions were subjected to the antitrust laws only when they were alleged to have acted in concert with non-labor groups to effect an end that violated those laws.[40] *Hutcheson* offered a much broader exemption than

section 6 of the Clayton Act which proscribed interference with members and labor organizations "carrying out the legitimate objects thereof." 15 U.S.C. § 17 (1970); see Great A & P Tea Co. v. Amalgamated Meat Cutters Local 88, 410 F.2d 650, 653 (8th Cir. 1969). "The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern . . . ." Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970).

38. Another view of the self-interest test came from the term "labor dispute" as defined in the Norris-La Guardia Act, 29 U.S.C. § 113 (1970); see, Taylor v. Local 7, Journeymen Horseshoers, 353 F.2d 593, 602 (4th Cir. 1965), cert. denied, 384 U.S. 969 (1966); Gulf Coast Shrimpers & Oystermans Ass'n v. United States, 236 F.2d 658, 664 (5th Cir.), cert. denied, 352 U.S. 927 (1956); United States v. Fish Smokers Trade Council, Inc., 183 F. Supp. 227, 236 (S.D.N.Y. 1960). Professor Cox issued a warning in this regard: "[I]t seems unwise to resort to restrictive interpretation of 'labor dispute' as a means of cutting down the scope of labor's present immunity from antitrust prosecution." Cox, supra note 1, at 269.

39. The Hutcheson Court proposed to interpret the term self-interest in the light of the previous legislation on the subject. 312 U.S. at 231. Hutcheson "read the Norris-La Guardia Act's definition of labor dispute into § 20 of the Clayton Act, and held that the acts which the defendants were alleged to have committed were, by reason of that section, not only non-enjoinable but not to 'be considered or held to be violations of any law of the United States.' " E. Dodd, The Supreme Court and Organized Labor 31 (1946). The result has been a sweeping exemption from antitrust laws for labor organizations. See Federation of Musicians v. Carroll, 391 U.S. 99, 105-14 (1968); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); Hunt v. Crumboch, 325 U.S. 821 (1945); Bodine Produce, Inc. v. United Farm Workers, 494 F.2d 541, 550-52 (9th Cir. 1974). "In short, union activity in pursuit of economic self-interest is exempt from the antitrust laws." Winter, supra note 2, at 44. Another commentator, reviewing the national labor policy after Hutcheson, wrote: "The national labor policy fosters, or at least tolerates, a large-scale labor organization despite its capacity to interfere with those economic and noneconomic objectives of the antitrust laws." Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965). The breadth of the self-interest test, even in the light of its interpretations, is summed up best in the language of a federal district court: "The 'self-interest' of a union and its members has been treated as synonymous with 'the legitimate objects' of organized labor. So long as the union acted in its self-interest, it was carrying out its legitimate objects, and so long as it did that, it was exempt from the antitrust violation, no matter what a court might think of the rightness or wrongness of its acts." Republic Prods., Inc. v. Federation of Musicians, 245 F. Supp. 475, 481 (S.D.N.Y. 1965). See also Willis, In Defense of the Court: Accommodation of the Conflicting National Policies, Labor and the Antitrust Laws, 22 Mercer L. Rev. 561, 566-78 (1971); Comment, Labor's Antitrust Exemption After Pennington and Jewel Tea, 66 Colum. L. Rev. 742, 746-62 (1966).

40. Hutcheson indicated that acting in combination with non-labor groups might subject union activities to the provisions of the Sherman Act. See text accompanying note 35 supra. This was affirmed in Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797 (1945) where the Court posed the question: "[D]o labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?" Id. at 801. The Court answered its own question in the affirmative. "[W]hen the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-La Guardia Acts." Id. at 809. In other words, "the same labor union activities may or may not be in violation of the Sherman Act,

had previously been available to organized labor. Despite some suggestions that the *Hutcheson* test be limited,[41] it remained the standard until *Connell.*[42]

Some have argued that Congress has recognized labor as a separate field, relatively immune from the federal antitrust laws.[43] This is supported by the congressional declaration of purpose and policy in the Labor-Management Relations Act of 1947.

> It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.[44]

In both the National Labor Relations Act and the Labor Management Relations Act Congress has addressed itself to a wide variety of labor union activities.[45] Many judges have considered whether Congress intended its

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dependent upon whether the union acts alone or in combination with business groups." Id. at 810. See also Local 167, Teamsters v. United States, 291 U.S. 293 (1934); United States v. Brims, 272 U.S. 549 (1926). "The test, as it has come down in various Supreme Court opinions, seems to turn on the union's combination with non-labor groups to create a monopoly among various conspiratory interests. In other words, the purposes sought by the conspiracy must have goals which go beyond legitimate union aims and result in an anticompetitive situation." Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154, 1158 (5th Cir. 1973).

In his dissenting opinion in the principal case, Justice Douglas indicated that perhaps a showing of a conspiracy might have altered his decision in this case. "The question of antitrust immunity would be far different, however, if it were alleged that Local 100 had conspired with mechanical subcontractors to force nonunion subcontractors from the market by entering into exclusionary agreements with general contractors like Connell." 95 S. Ct. at 1843 (dissenting opinion).

41. "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement." Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965). "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act . . . ." UMW v. Pennington, 381 U.S. 657, 665 (1965).

42. See, e.g., Webb v. Bladen, 480 F.2d 306, 308 (4th Cir. 1973); Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir.), cert. denied, 393 U.S. 983 (1968); Iodice v. Calabrese, 345 F. Supp. 248, 269 (S.D.N.Y. 1972); Republic Prods., Inc. v. Federation of Musicians, 245 F. Supp. 475 (S.D.N.Y. 1965); see also Comment, Labor's Antitrust Exemption After Pennington and Jewel Tea, 66 Colum. L. Rev. 742 (1966).

43. See generally UMW v. Pennington, 381 U.S. 657, 697-735 (1965) (Goldberg, J., concurring & dissenting).

44. 29 U.S.C. § 141 (1970).

45. See, e.g., 29 U.S.C. § 158 (1970) (unfair labor practices); id. § 187 (1970) (provides private action for damages due to unfair labor practices). "Congress selected with great care the sanctions to be imposed if proscribed union activity should occur." 95 S. Ct. at 1843 (dissenting opinion).

labor legislation as an exclusive source of remedies in the field.[46] Professor Meltzer has noted that:

> Congress, by amendments to the National Labor Relations Act (NLRA), regulated such practices and proscribed conduct such as secondary boycotts and jurisdictional disputes that prior to *Hutcheson* had been condemned or attacked under the Sherman Act.[47]

The main questions raised in *Connell* were whether the remedies provided in the labor law were intended to be exclusive in all cases[48] and if not,[49] should they be exclusive in this particular case.

In reaching its decision in *Connell,* the Court seemed to apply a pre-*Hutcheson* test[50] to determine whether the union activity was exempt from the antitrust laws. The Court acknowledged that the union's actions were legal and in its own self-interest and therefore in compliance with the *Hutcheson* requirements for exemption. It merely sought to organize subcontractors in the area, a legitimate object for such a union to pursue.[51] Moreover, there was no evidence or allegation of any conspiracy with a non-labor group.[52] In refusing to include this agreement within the labor exemption, the Court looked not to motivation but to effect, a test which *Hutcheson* seemingly rendered obsolete.[53] The Court stated:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. . . . But the methods the union chose

46. E.g., Connell Constr. Co. v. Plumbers Local 100, 95 S. Ct. at 1843 (Stewart, J., dissenting); Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 697 (1965) (Goldberg, J., concurring & dissenting); NLRB v. Local 449, Teamsters, 353 U.S. 87, 92-96 (1957) (Brennan, J.); United States v. Hutcheson, 312 U.S. 219, 243 (1941) (Roberts, J., dissenting).

47. Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 669 (1965) (footnote omitted); see W. Wilson, Labor Law Handbook 377-83 (1963); Note, Accommodation of the Norris-LaGuardia Act to Other Federal Statutes, 72 Harv. L. Rev. 354 (1958).

48. See generally note 45 supra.

49. "My view that Congress intended that collective bargaining activity on mandatory subjects of bargaining under the Labor Act not be subject to the antitrust laws does not mean that I believe that Congress intended that activity involving all nonmandatory subjects of bargaining be similarly exempt." Local 189, Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 732 (1965) (Goldberg, J., concurring & dissenting); see United States v. Olympia Provision & Baking Co., 282 F. Supp. 819, 826 (S.D.N.Y. 1968), aff'd sub nom. Provision Salesmen Union v. United States, 393 U.S. 480 (1969); United States v. Local 639, Teamsters, 32 F. Supp. 594, 598 (D.D.C. 1940).

50. See notes 29-33 supra and accompanying text. Many critics, including the ABA, have urged a return to the Apex standard. See Cox, supra note 1, at 263, 280.

51. 95 S. Ct. at 1836. Generally speaking, organizational picketing is a legitimate union activity. See 29 U.S.C. §§ 157, 158 (1970); International Hod Carriers, Local 840, 135 N.L.R.B. 1153, 1155 (1962).

52. 95 S. Ct. at 1836 n.2, 1843 (Douglas, J., dissenting). Thus the one broad exception to the antitrust immunity for labor did not apply. See note 40 supra and accompanying text.

53. "In 1941, the doubts and problems left by the Apex opinion were swept into limbo by a series of decisions [United States v. Hutcheson, 312 U.S. 219 (1941); United States v. Building & Constr. Trades Council, 313 U.S. 539 (1941); United States v. United Bhd. of Carpenters, 313 U.S. 539 (1941); Unites States v. American Fed'n of Musicians, 318 U.S. 741 (1943)] resulting from . . . prosecution[s] of labor unions." Cox, supra note 1, at 264.

are not immune from antitrust sanctions simply because the goal is legal. . . . This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust law.[54]

While the courts have insisted all along that the right of labor unions to be exempt was not absolute,[55] yet except for certain circumstances,[56] it was apparent to some commentators that it was indeed absolute.[57] The reason was that the *Hutcheson* test was simply too broad.[58] In *Connell,* the Court has limited the extent of the labor union antitrust exemption, apparently because the balance[59] between competitive business economy and labor's right to organize, at least in this case, seems to have swung the other way.[60] The union's actions created a direct restraint on competition[61] to an extent that the Court refused to

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54. 95 S. Ct. at 1836.

55. See note 49 supra; UMW v. Pennington, 381 U.S. 657 (1965); Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 689-701 (1965).

56. See note 40 supra.

57. "The ruling [Hutcheson] theoretically may be limited, but the practical consequence was to make the Sherman Act inapplicable to all combinations of employees regardless of the objective." Cox, supra note 1, at 265 (footnote omitted); see note 39 supra.

58. "The fault is that the decision may have been too sweeping. To accept the view that the Sherman Act is not a proper vehicle for evolving a comprehensive law of strikes and picketing does not require one to say that employees may combine to impose restraints on competition which would be unlawful when imposed by employers—for example, fixing the market price. The legality of such restraints should be judged [separately] . . . . In the absence of fraud or violence, the Hutcheson case immunized any restraint of trade imposed by a labor union." Cox, supra note 1, at 265. "[Circumstances surrounding Hutcheson] may have induced the majority to place its decision upon broader grounds than the controversy demanded." 54 Harv. L. Rev. 887, 888 (1941).

59. See text accompanying note 18 supra. "In recent years the Supreme Court has had to struggle with the problem of balancing these recognized congressional objectives." 483 F.2d at 1162.

60. See generally Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 63 F. Supp. 254 (E.D. Pa. 1945), rev'd on other grounds, 155 F.2d 799 (3d Cir. 1946).

61. "The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods." 95 S. Ct. at 1835. "The multiemployer bargaining agreement . . . is relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market. The 'most favored nation' clause . . . promised to eliminate competition between members of the Association and any other subcontractors that Local 100 might organize . . . . [T]he restriction on subcontracting would eliminate competition on all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours and working conditions." Id. at 1835-36 (footnote omitted). "Success . . . would also give Local 100 power to control access to the market for mechanical subcontracting work . . . . Such control could result in significant adverse effects on the market and on consumers, effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." Id. at 1836.

permit. "Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members."[62] While the decision in *United States v. Hutcheson* has not been overruled,[63] it certainly has been narrowed.

The union also alleged that it came within the statutory exemption and argued that: (1) the agreement which was concluded with the general contractor was authorized by section 8(e) of the NLRA;[64] (2) jurisdiction to decide whether such an interpretation should be given to section 8(e) lay exclusively with the NLRB;[65] and (3) that if the NLRA was violated by the union's conduct, then the remedies provided for such action by the NLRA are exclusive.[66]

Section 8(e) of the NLRA makes it an unfair labor practice for a labor organization and an employer to enter into an agreement whereby the employer agrees to refrain from doing business with any other employer. However, it specifically exempts agreements between unions and employers in the construction industry when such agreements relate to the subcontracting of work to be done at the construction site.[67] The Supreme Court held that the spirit and not the letter of the law must control and that the agreement was not protected by section 8(e).[68]

The Court had little difficulty discarding the Fifth Circuit's finding[69] that jurisdiction to determine the applicability of the NLRA to specific situations lay solely with the NLRB. The Court held that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws."[70]

The four dissenting justices in *Connell* took issue with the assertion that antitrust remedies applied. The thrust of their conclusion was that, assuming there was a violation, the remedies were provided exclusively by the national labor law.

In sum, the legislative history of the 1947 and 1959 amendments and additions to national labor law clearly demonstrates that Congress did not intend to restore antitrust sanctions for secondary boycott activity such as that engaged in by Local 100 in this case, but rather intended to subject such activity only to regulation under the National Labor Relations Act and § 303 of the Labor Management Relations Act. The judicial imposition of 'independent federal remedies' not intended by Congress, no less than the application of state law to union conduct that is either protected

62. Id. at 1835.

63. Hutcheson is cited with approval by the Court in this case. Id. at 1835.

64. Id. at 1837; see note 7 supra.

65. Id. at 1837.

66. Id. at 1840.

67. 29 U.S.C. § 158(e) (1970); see note 7 supra.

68. 95 S. Ct. at 1840. Ruling on the same question, the District Court found it clear that § 8(e) did protect the agreement. 78 L.R.R.M. at 3014. The Court of Appeals, on the other hand, refused to address the issue, holding that such a question was within the province of the NLRB. 483 F.2d at 1174.

69. 483 F.2d at 1169.

70. 95 S. Ct. at 1837.

or prohibited by federal labor law, threatens 'to upset the balance of power between labor and management expressed in our national labor policy.'[71]

The dissent found that the legislative history of the Taft-Hartley[72] and the Landrum-Griffin Acts[73] warranted only the conclusion that "Congress deliberately chose not to subject unions engaging in prohibited secondary activity to the sanctions of the antitrust laws."[74] On the other hand, the majority opinion held that:

> There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.[75]

Thus the Court looked to the specific statutes cited by the respondent[76] and concluded that they did not offer the union protection either from the jurisdiction of the Supreme Court or from the application of the antitrust laws.[77]

While the Court technically did not decide whether Local 100's agreement with the petitioner constituted a violation of the antitrust laws,[78] it strongly implied that this was the case.[79] It did hold that a union, acting legally, unilaterally,[80] and in its own self-interest is, under certain circumstances,[81] subject to the antitrust laws.[82] This decision will expand the role of the judiciary[83] since it requires balancing the policies favoring free competition

71. Id. at 1851 (footnote omitted).

72. In Congress, Senator Taft explained the intention of his bill as providing a remedy for labor antitrust problems "parallel" to antitrust remedies for illegal business activities. 93 Cong. Rec. 4872-73 (1947).

73. Rep. Griffin made it clear that his bill intentionally excluded any antitrust provisions. 105 Cong. Rec. 15535 (1959).

74. 95 S. Ct. at 1844.

75. Id. at 1841 (footnote omitted).

76. Id. at 1837, 1840; 29 U.S.C. § 158 (1970) (expanding unfair labor practices to include secondary activity and containing the exemption for the construction industry); id. §§ 160(1), 187 (1970) (provides remedies for parties injured by activities rendered illegal by § 158); see note 7 supra.

77. 95 S. Ct. at 1841.

78. Id. at 1837.

79. "[T]his agreement . . . has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions." Id. at 1841; see id. at 1835.

80. See text accompanying note 10 supra.

81. See text accompanying notes 1-4 supra. See also notes 61 supra & 86 infra.

82. 95 S. Ct. at 1841.

83. Hutcheson had provided a test which seemed to limit the role of the judiciary to a greater extent than ever before. It provided a guideline that the courts could apply simply. 312 U.S. at 231-32; see cases cited at note 53 supra; Connell Constr. Co. v. Plumbers Local 100, 483 F.2d 1154 (5th Cir. 1973); Suburban Tile Center, Inc. v. Rockford Bldg. Council, 354 F.2d 1 (7th Cir. 1965), cert. denied, 384 U.S. 960 (1966). "Hutcheson was the right decision, therefore, not because as a matter of national policy unions should be free to pursue their economic self-interest to the limit but

with those favoring "the association of employees to eliminate competition over wages and working conditions."[84] Moreover, as in the past, it may draw a response from Congress.[85]

The immediate effect of *Connell* is unclear. It reopens a door which *Hutcheson* seemed to have effectively closed. However, there are factors[86] which may allow the case to be distinguished. This makes an attempt to assess its impact difficult at this time. The test of "direct restraint on the business market [with] substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions"[87] is vague and subject to further interpretation.[88] The significance of *Connell* may be that the Supreme Court of the United States concurred with Circuit Judge Clark's dissent. "I cannot agree that a labor organization enjoys a virtually total immunity from federal antitrust jurisdiction."[89]

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because that judgment was left to more appropriate governmental institutions." Winter, supra note 2, at 45. Winter was dissatisfied with the idea of extensive judicial involvement in this area. "The courts have, for some seventy-odd years, sought to harmonize the conflicting policies of collective bargaining and competition. But the conflict is so irreconcilable that, apart from entirely subordinating one to the other, the regulatory distinctions employed must be largely arbitrary—there are no general principles by which these policies can be harmonized. And since the courts generally must rely on principle in the exercise of the judicial function, their record is not a happy one." Id. at 16-17. Another commentator has concluded: "Experience gives us no reason to have confidence in the ability of judges to handle labor problems." Sovern, Some Ruminations on Labor, the Antitrust Laws and Allen Bradley, 13 Lab. L.J. 957, 963 (1962) (footnote omitted). While Professor Cox's language is less severe, his thoughts were basically similar. "[T]he experience of organized labor under the Sherman Act seems adequate justification for insisting that only the truly borderline cases be left for judicial decision." Cox, supra note 1, at 283. Cox has submitted a sample piece of legislation as a suggested guideline for a possible solution. Id. at 284 n.117.

84. 95 S. Ct. at 1835.

85. See notes 20-28 supra and accompanying text.

86. See note 61 supra. Distinctive factors in Connell include: (1) the multi-employer unit with the "most favored nation" clause; (2) the lack of a collective bargaining relationship between the parties to the agreement; (3) the agreement permitting subcontracting only to those having an agreement with the particular local to subcontract; (4) the inevitable result of "top-down" organizing ("top-down" organizing refers to efforts by management to cause employees to join a union rather than vice-versa) and (5) unavailable labor law remedies. "Defendant [Local 100] sent a similar contract to the one involved in this case to K.A.S. Construction Company in Richardson, Texas, and picketed the company. K.A.S. refused to sign the proposed agreement and made a complaint to the Regional [NLRB] in Fort Worth, Texas. The NLRB refused to issue a complaint and appeal was filed with the General Counsel of the NLRB in Washington. On August 30, 1970, the appeal was denied by the General Counsel." 78 L.R.R.M. at 3013-14.

87. 95 S. Ct. at 1836.

88. E.g., Questions as to the standards or criteria for measuring "direct restraint" or "substantial anticompetitive effects" have not been clearly resolved in Connell. The question of what "follows naturally from the elimination of competition over wages and working conditions" may also prove to be fertile ground for judicial speculation and interpretation.

89. 483 F.2d at 1175-76.

Workman's Compensation—New York Court of Appeals Holds That Mental Injury Precipitated by Psychic Trauma Is Compensable—On June 9, 1971 John Forman, a department store security director, committed suicide. The claimant, his secretary, found him lying in a pool of blood. Forman had a history of becoming "agitated and nervous" due to the annual pressures of the Christmas season. Following the 1970 season the pressures did not abate and he became increasingly concerned about his job performance. The firing of a fellow security director at a neighboring store intensified his fears. Forman regularly confided these fears to the claimant, who, in an effort to ease his burden and boost his morale, increasingly assumed certain of his responsibilities.

After the suicide, the claimant alleged that she was beset by an obsessive feeling of guilt because of her failure to prevent Forman's death. There was no dispute that these guilt feelings developed into an "acute depressive reaction." Claimant lost twenty pounds and ultimately had to leave work for approximately six months. During these months she underwent two periods of hospitalization, receiving psychotherapy, medication and three weeks of shock treatment. The referee granted claimant's demand for compensation and the workmen's compensation board affirmed. On appeal, the Appellate Division reversed, holding that mental injury precipitated solely by psychic trauma was not compensable as a matter of law.[1] The Court of Appeals in turn reversed, sustaining the recovery. *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975).

Workmen's compensation developed as an alternative to traditional tort remedies which denied recovery to workmen injured on the job.[2] At common law, a worker claiming damages for on the job injuries was confronted with three recovery-defeating defenses known as the "unholy trinity."[3] If the worker was partly at fault in the accident, "contributory negligence" barred his recovery.[4] On the other hand, if a fellow-worker was responsible for the injury, the injured worker's action would fall within the "fellow-servant rule."[5] Finally if the contract of employment could be construed to subject the worker to the risk of injury, the defense of "assumption of the risk" would effectively bar his claim.[6]

1. Wolfe v. Sibley, Lindsay & Curr Co., 44 App. Div. 2d 739, 354 N.Y.S.2d 470 (3d Dep't 1974), rev'd, 36 N.Y.2d 505, 330 N.E.2d 603, 369 N.Y.S.2d 637 (1975).

2. Horovitz, Injury and Death Under Workmen's Compensation Laws 8 (1944) [hereinafter cited as Horovitz].

3. W. Prosser, Torts § 80, at 526-27 (4th ed. 1971).

4. See, e.g., Schlemmer v. Buffalo, R. & P. Ry., 220 U.S. 590, 596-97 (1911); Narramore v. Cleveland, C., C. & St. L. Ry., 96 F. 298, 305 (6th Cir.), cert. denied, 175 U.S. 724 (1899); Limberg v. Glenwood Lumber Co., 127 Cal. 598, 60 P. 176 (1900); Meunier v. Chemical Paper Co., 180 Mass. 109, 61 N.E. 810 (1901).

5. See, e.g., Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49 (1842); Coon v. Syracuse & U. R.R., 6 Barb. 231 (1849), aff'd, 5 N.Y. 492 (1851); Ryan v. Cumberland Valley R.R., 23 Pa. 384 (1854).

6. See, e.g., Lang v. United States Reduction Co., 110 F.2d 441, 442 (7th Cir. 1940); Ehrenberger v. Chicago, R. I. & P. Ry., 182 Iowa 1339, 1342, 166 N.W. 735, 736 (1918); Cooper v. Mayes, 234 S.C. 491, 495, 109 S.E.2d 12, 15 (1959); Walsh v. West Coast Coal Mines, Inc., 31 Wash. 2d 396, 406, 197 P.2d 233, 238 (1948).

In the late nineteenth century, Germany and England enacted laws which for the first time compensated workers for work-related injuries not on a theory of negligence, but solely because of their relationship to the job.[7] Early in the twentieth century, support grew in the United States for similar laws,[8] and by 1920 the vast majority of states had enacted them.[9] All of these statutes were intended to be complete substitutes for common law tort recovery.[10] They focused on the economic plight of employees injured in the course of employment rather than on the identity of the wrongdoer.[11]

Arguably, the proper implementation of the legislative purpose underlying workmen's compensation laws requires the circumvention of common law rules and methods.[12] Nevertheless, courts have regularly applied common law concepts to workmen's compensation cases.[13] Thus, for example, in such cases New York applied the traditional "contact rule," which required that there be some physical contact or injury before recovery would be allowed. The statute, however, merely required that an injury be "accidental."[14]

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7. Horovitz, supra note 2, at 5. In the present New York law compensable injuries are only those "accidental injuries arising out of and in the course of employment . . . ." N.Y. Workmen's Comp. Law § 2(7) (McKinney 1965). The courts are expected to interpret this phrase broadly in order to realize the humane purpose of the statute. Heitz v. Ruppert, 218 N.Y. 148, 154, 112 N.E. 750, 752 (1916). The injury not only must be incurred on the job, but must be a natural result of that work. Id. at 152, 112 N.E. at 751.

8. There were several false starts. An early Montana law was held unconstitutional. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911). New York's first workmen's compensation law, Law of June 25, 1910, ch. 674, [1910] Laws of New York, was held unconstitutional one year after enactment. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911). In 1917 the United States Supreme Court in a trio of cases upheld the constitutionality of the states' workmen's compensation laws. See New York Central R.R. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakley, 243 U.S. 210 (1917); and Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

9. See generally 1 A. Larson, The Law of Workmen's Compensation § 5 (1972) [hereinafter cited as Larson].

10. See Horovitz, supra note 2, at 8.

11. E.g., Charon's Case, 321 Mass. 694, 697, 75 N.E.2d 511, 513 (1947).

12. See Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291, 293 (1941).

13. "Almost every major error . . . in the development of compensation law, whether judicial or legislative, can be traced . . . to the importation of tort ideas . . . ." 1 Larson, supra note 9, § 1.20, at 2-3.

One tort concept frequently incorporated into the statutes was that of "proximate cause" or "foreseeability." See, e.g., Hewitt's Case, 225 Mass. 1, 113 N.E. 572 (1916); Hopper v. Industrial Comm'n, 71 Ohio App. 156, 48 N.E.2d 125 (1943); Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 270 S.W.2d 389 (1954); Service Mut. Ins. Co. v. Vaughn, 130 S.W.2d 392 (Tex. Civ. App. 1939). But see Corken v. Corken Steel Prods., Inc., 385 S.W.2d 949 (Ky. 1965).

In Wolfe the dissent seemed to urge the use of another tort concept—that of denial of recovery to innocent bystanders for purely mental injury. Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505, 511, 330 N.E.2d 603, 608, 369 N.Y.S.2d 637, 644 (Breitel, C.J., dissenting). See notes 70-74 infra and accompanying text.

14. New York's statute defines "injury" and "personal injury" to mean "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." N.Y. Workmen's Comp. Law § 2(7) (McKinney 1965). Some states

The "contact rule" in New York tort law was first enunciated in *Mitchell v. Rochester Ry.*[15] The court there held that although the plaintiff had fainted and suffered a miscarriage because of the defendant's negligent handling of his horses, there could be "no recovery . . . for mere fright."[16] The court justified its decision by citing the need to avoid both "fictions or speculative claims" and a "flood of litigation."[17] *Mitchell* remained the law of New York[18] until 1961, when the "contact" rule, as applied to tort law, was laid to rest in *Battalla v. State.*[19]

In workmen's compensation cases the "contact" rule had been applied principally in situations where mental injuries resulted from physical causes or where mental or physical injuries resulted from mental or emotional stimuli. These cases have been grouped into three categories: those involving physical impact producing psychological injury (physical-mental); those where psychic trauma produces physical injury (mental-physical); and cases where psychic trauma produces psychological injury (mental-mental).[20]

The "physical-mental" cases satisfy the "contact" requirement and courts have seldom had any problem in affirming awards made by the workmen's compensation board. The main question in these cases is usually a factual one: did the physical event cause the mental injury? Where the board has based its

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require a seemingly more stringent test. See, e.g., La. Rev. Stat. § 23:1021(7) (1964) ("violence to the physical structure of the body"); Mo. Ann. Stat. § 287.020(3) (Vernon 1965) ("violence to the physical structure of the body"); Tex. Rev. Civ. Stat. Ann. art. 8306, § 20 (Vernon 1967) ("damage or harm to the physical structure of the body"). Interestingly, however, the courts of both Texas and Missouri have interpreted their statutes broadly to allow recovery for purely mental injuries which involved no contact. Todd v. Goostree, 493 S.W.2d 411 (Mo. Ct. App. 1973) (neurosis which developed after claimant accidentally ran over co-worker with truck prevented him from continuing as a truck driver); Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955) (neurosis produced by nearly falling off scaffold and seeing co-worker killed prevented claimant from being able to work on a scaffold). Contra, Hackett v. Travellers Ins. Co., 195 So. 2d 758 (La. Ct. App. 1967) (no recovery for "trauma psychosis" developed after being 80 feet from explosion which killed two other men).

15. 151 N.Y. 107, 45 N.E. 354 (1896).

16. Id. at 109, 45 N.E. at 354.

17. Id. at 110, 45 N.E. at 355. In Wolfe, Chief Judge Breitel argued in his dissent, "The holding in this case does not open a door [to a flood of litigation], but tears down a whole side of the structure." 36 N.Y.2d 505, 513, 330 N.E.2d 603, 608, 369 N.Y.S.2d 637, 644 (1975) (Breitel, C.J., dissenting). On this point Prof. Prosser states, "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds." W. Prosser, Torts § 12, at 51 (4th ed. 1971) (footnote omitted).

18. During the long reign of the "contact" rule, however, courts found ways of circumventing it. See, e.g., In re Wilson, 257 N.Y. 230, 177 N.E. 431 (1931) where plaintiff's testatrix left a car after an accident, fainted from nervous shock, and fractured her skull on sidewalk. The court held that the physical injury was within the realm of defendant's anticipation.

19. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961) (infant plaintiff allowed recovery for fright resulting from ski-lift ride when employee failed to properly secure belt).

20. See generally 1A Larson, supra note 9, §§ 42.20-.24; E. Render, Mental Illness as an Industrial Accident, 31 Tenn. L. Rev. 288 (1964).

findings on some "substantial evidence,"[21] the courts *must* rely on these findings.[22] Under this constraint the courts have affirmed awards for mental injuries which resulted from, for example, an accidental wrist injury,[23] a blow on the forehead,[24] and a fall from scaffolding.[25]

Adherence to the "substantial evidence rule" has resulted in cases from which little can be drawn by way of legal principle other than the conclusion that the board's interpretation of the facts will be sustained. For example, in *Edmonds v. Kalfaian & Son, Inc.*,[26] the court affirmed the board's finding that the amputation of claimant's arm shortly after an industrial accident caused claimant's mental illness nine years later. In *Krasinski v. American Brass Co.*,[27] on the other hand, the court affirmed the board's denial of a claim for compensation for a psychosis which developed ten years after an industrial accident.

In cases involving "mental-physical" injuries no "contact" exists, but compensation for such injuries is well established in most jurisdictions.[28] New York courts have consistently affirmed awards in this context.[29] In *Church v. County of Westchester*,[30] the decedent, who had designed and constructed an amuse-

21. The United States Supreme Court has stated that a requirement of "substantial evidence" is no different from a requirement of "any evidence." Del Vecchio v. Bowers, 296 U.S. 280 (1935). Impliedly, then, an appellate court must uphold the board's findings if those findings were supported by any evidence at all. New York may require a more stringent test. This test requires "evidence . . . that a reasonable mind might accept as adequate to support the conclusion reached by the board." See, e.g., Schechter v. State Ins. Fund, 6 N.Y.2d 506, 513, 160 N.E.2d 901, 905, 190 N.Y.S.2d 656, 662 (1959). A finding of fact based on no evidence is an error of law and a court may reverse. 3 Larson, supra note 9, § 80.10, at 246-47.

22. "The decision of the board shall be final as to all questions of fact . . . ." N.Y. Workmen's Comp. Law § 20 (McKinney 1965).

23. Knief v. Great Atlantic & Pacific Tea Co., 30 App. Div. 2d 748, 291 N.Y.S.2d 463 (3d Dep't 1968).

24. McGuirk v. J.J. Harrington & Co., 262 App. Div. 980, 30 N.Y.S.2d 68 (3d Dep't 1941).

25. Trgo v. Harris Structural Steel Corp., 13 App. Div. 2d 856, 214 N.Y.S.2d 791 (3d Dep't 1961).

26. 9 App. Div. 2d 551, 189 N.Y.S.2d 456 (3d Dep't 1959).

27. 12 App. Div. 2d 827, 209 N.Y.S.2d 335 (3d Dep't 1961).

28. See, e.g., Fireman's Fund Indem. Co. v. Industrial Acc. Comm'n, 109 Cal. App. 637, 241 P.2d 299 (1st Dist.), aff'd, 39 Cal. 2d 831, 250 P.2d 148 (1952) (stroke caused by sixty-five days of tension while negotiating a labor contract); Marotte v. State Compensation Ins. Fund, 145 Colo. 99, 357 P.2d 915 (1960) (emotional strain of being in auto accident caused policeman's heart attack); Roberts v. Dredge Fund, 71 Idaho 380, 232 P.2d 975 (1951) (claimant intestate's heart stopped after she was frightened by "fire ball" from short circuit); J.N. Geipe, Inc. v. Collett, 172 Md. 165, 190 A. 836 (1937) (excitement of trying to avoid automobile collision caused driver's paralysis); Klein v. Len H. Darling Co., 217 Mich. 485, 187 N.W. 400 (1922) (worker who accidentally caused co-worker's death suffered fatal shock); Hall v. Doremus, 114 N.J.L. 47, 175 A. 369 (1934) (worker fainted while witnessing birth of calf and fractured his skull); Aetna Ins. Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App. 1958) (laundry employee suffered stroke because of customer's berating); see also State Compensation Fund v. Industrial Comm'n., 535 P.2d 623 (Ariz. Ct. App. 1975) (anxiety resulting from hitting pedestrian caused employee's heart attack).

29. See text accompanying notes 30-37 infra.

30. 253 App. Div. 859, 1 N.Y.S.2d 581 (3d Dep't 1938).

ment park ride on which a child was injured, testified on behalf of his employer in the subsequent negligence suit. During cross examination he became agitated and nervous, and suffered a fatal coronary occlusion. The board's award of compensation was affirmed by the court.

In *Klimas v. Trans Caribbean Airways, Inc.*[31] the decedent was director of maintenance and engineering for the respondent airline when one of two aircraft of which he had charge was grounded by the Civil Aeronautics Authority. The employer held the decedent responsible for this "sheer negligence."[32] The bill for the repair of the planes was extremely high, though the decedent made intensive efforts to have the cost reduced. At the "climax" of these efforts, the decedent suffered a fatal heart attack. The Court of Appeals, reinstating an award by the workmen's compensation board, held that an accident need not be a sudden occurrence to be compensable under the workmen's compensation law.[33] The court observed that mental strain from work is frequently more devastating than mere physical injury.[34]

Subsequent to *Klimas,* New York courts have affirmed awards in cases where: a claimant suffered a heart attack after narrowly avoiding an automobile accident in a company car;[35] an overworked sales executive on an extremely tight meeting schedule suffered a stroke after an emergency plane landing;[36] and a judge had a fatal heart attack as a result of working unusually long hours after being directed to clear up the court calendar.[37]

In contrast with the general willingness of courts to affirm awards in the "mental-physical" and "physical-mental" categories, some American jurisdictions have been reluctant to affirm awards in the "mental-mental" category.[38] Arguably, this reluctance is attributable to the courts' insistence on some "physical" element[39] analogous to that required by the "contact rule."[40] The English courts, however, rejected the requirement of physical contact or physical injury at an early date,[41] and in recent times the majority of American jurisdictions have followed this example.[42]

31. 10 N.Y.2d 209, 176 N.E.2d 714, 219 N.Y.S.2d 14 (1961).

32. Id. at 211, 176 N.E.2d at 715, 219 N.Y.S.2d at 15.

33. Accord, Fireman's Fund Indem. Co. v. Industrial Acc. Comm'n, 109 Cal. App. 637, 241 P.2d 299 (1st Dist.), aff'd, 39 Cal. 2d 831, 250 P.2d 148 (1952).

34. 10 N.Y.2d at 213, 182 N.E.2d at 716, 227 N.Y.S.2d at 16.

35. Eckhaus v. Adeck Stores, Inc., 11 N.Y.2d 862, 182 N.E.2d 287, 227 N.Y.S.2d 680 (1962).

36. Lobman v. Bernard Altmann Corp., 19 App. Div. 2d 931, 244 N.Y.S.2d 425 (3d Dep't 1963), aff'd, 15 N.Y.2d 506, 202 N.E.2d 559, 254 N.Y.S.2d 113 (1964).

37. Major v. New York State Ct. of Claims, 31 App. Div. 2d 993, 297 N.Y.S.2d 768 (3d Dep't 1969) (per curiam).

38. See, e.g., Shope v. Industrial Comm'n, 17 Ariz. App. 23, 495 P.2d 148 (1972) (neurosis caused by emotional stress over period of years); Brady v. Royal Mfg. Co., 117 Ga. App. 312, 160 S.E.2d 424 (1968) (emotional upset at work resulted in loss of use of arm).

39. See 1 Larson, supra note 9, § 42.23, at 7-373.

40. See notes 14-19 supra and accompanying text.

41. See, e.g., Yates v. South Kirkby, & Collieries, Ltd., [1910] 2 K.B. 538 (court affirmed award for damages resulting from inability of claimant to work at coal face because of mental shock brought about when falling timber killed fellow workman despite claimant's rescue attempt).

42. See, e.g., Baker v. Workmen's Compensation Appeals Bd., 18 Cal. App. 3d 852, 96 Cal.

Prior to *Wolfe,* the New York courts had never affirmed an award for a "mental-mental" injury and New York law was in a state of confusion on this matter.[43] The Court of Appeals had repeatedly refused to decide whether psychic injuries produced by psychic trauma were compensable as a matter of law.[44]

In *Chernin v. Progress Service Co.*[45] the claimant, a New York City taxi driver, struck a pedestrian who darted in front of his cab. The driver suffered no physical injuries, but became abusive to a policeman on the scene and created a disturbance. Approximately one month after the accident, he was admitted to a hospital with a mental condition.[46] The Court of Appeals avoided the legal issue

Rptr. 279 (4th Dist. 1971) (fireman claimed to have been disabled by "cardiac neurosis" caused by stresses and anxieties of employment); Lyng v. Rao, 72 So. 2d 53 (Fla. 1954) (though claimant suffered no visible injury, she experienced chest pains after building had been struck by lightning); Carter v. General Motors Corp., 361 Mich. 577, 106 N.W.2d 105 (1960) (claimant's psychosis triggered by worry over inability to keep up with assembly line); Simon v. R.H.H. Steel Laundry, Inc., 25 N.J. Super. 50, 95 A.2d 446, aff'd, 26 N.J. Super. 598, 98 A.2d 604 (1953) (explosion of steel pipe produced psycho-neurotic disability but no physical injury); Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955) (claimant's disabling neurosis caused by nearly falling off scaffold after support cable broke and seeing co-worker killed in same incident); Burlington Mills Corp. v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941) (claimant's disabling neurosis occurred several weeks after being frightened by electric flash from short circuit). See generally 1 Larson, supra note 9, § 42.23.

43. See Comment, Mental Stress and Mental Injury in New York Workmen's Compensation, 16 Buffalo L. Rev. 727, 736 (1967).

44. The confusion was compounded by a series of cases bypassing each other in the court structure. In Chernin v. Progress Service Co., 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (3d Dep't 1959), aff'd, 9 N.Y.2d 880, 175 N.E.2d 827, 216 N.Y.S.2d 697 (1961), the Third Department reversed an award by the workmen's compensation board for a "mental-mental" injury, holding that "[there is] nothing in the law that connotes purely excessive emotions—anger, grief or other mental feelings—unaccompanied by physical force or exertion can be the basis of an accident." Id. at 172, 192 N.Y.S.2d at 760. See text accompanying notes 45-48 infra. Before Chernin had reached the Court of Appeals, the board denied an award in another "mental-mental" case, considering itself bound as a matter of law by the Appellate Division's holding in Chernin. See Straws v. Fail, 17 App. Div. 2d 998, 233 N.Y.S.2d 893 (3d Dep't 1962), motion for leave to appeal denied, 12 N.Y.2d 647 (1963). See text accompanying notes 49-51 infra. Before Straws reached the Appellate Division, however, the Court of Appeals heard Chernin, supra, and avoided the legal issue of compensability for such mental injuries by deciding on the facts that the claimant had suffered no accidental injury. 9 N.Y.2d 880, 175 N.E.2d 827, 216 N.Y.S.2d 697 (1961). See text accompanying notes 47-48 infra. Shortly after the Chernin opinion in the Court of Appeals, the Appellate Division noted in another case that the Court of Appeals had left the law open as to "mental-mental" cases. See Schwartz v. Hampton House Management Corp., 14 App. Div. 2d 936, 221 N.Y.S.2d 286 (3d Dep't 1961) (decided on other grounds). When Straws reached the Appellate Division the following year, however, the court ignored the Court of Appeals opinion in Chernin, and affirmed the board's denial of an award on the basis of its own reasoning in Chernin. 17 App. Div. 2d at 998, 233 N.Y.S.2d at 894. Arguably, the court believed there was no reason to modify its own Chernin holding, since the final determination of the legal question must be made by the Court of Appeals. However, the Court of Appeals refused to review Straws, 12 N.Y.2d 647 (1963); so the uncertainty continued.

45. 9 N.Y.2d 880, 175 N.E.2d 827, 216 N.Y.S.2d 697 (1961), aff'g 9 App. Div. 2d 170, 192 N.Y.S.2d 758 (3d Dep't 1959).

46. There was a factual dispute as to whether the accident caused the mental illness. Testimony

by holding that, on the facts, the claimant suffered no accidental injury at the time of the original mishap.[47] As to the legal issue involved the court stated: "We do not decide whether an occurrence arising out of and in the course of employment which causes psychological trauma may in any case be compensable even though there was no physical injury."[48]

The same issue came before the courts in *Straws v. Fail.*[49] The claimant in *Straws* was a porter at a billiard parlor who was directed by his employer to accompany a stricken co-worker to the hospital. En route, the co-worker collapsed and died in the claimant's arms. The claimant contended that as a result of the experience he suffered headaches, dizziness, weakness, pain, insomnia and nausea, all of which caused a year-long psychological disablement.[50] The Court of Appeals refused to review an Appellate Division ruling affirming the board's decision that the alleged injury was not compensable as a matter of law.[51]

This refusal of the Court of Appeals to decide the issue of compensability for "mental-mental" injuries was widely criticized.[52] Larson was particularly acid in his criticism:

> It might be a good thing to remind our appellate courts from time to time that, under a system of law made up in large degree of case decisions, the building up of a reasonably complete body of law often depends on the accident of whether a suitable set of facts gets into appellate litigation. When a perfect opportunity to clear up an important unsettled point does happen at last to come along—as it did in the *Straws* case—the refusal of the court of last resort to discharge its decisional responsibility is inexplicable. How long will it be before another clean-cut case of mental stimulus creating mental injury reaches the Court of Appeals? . . . It is difficult to see why the New York courts should in 1963 be indecisive about a concept which the King's Bench accepted without difficulty in 1910 . . . .[53]

In *Wolfe* the Court of Appeals went to some length to reconcile its opinion with Larson's views.[54] At the outset of its opinion the court distinguished the basic

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the board received from the claimant's brother relating to the claimant's alleged personality change after the accident conflicted with that received from associates of the claimant's employer. 9 App. Div. 2d at 171, 192 N.Y.S.2d at 758; see note 57 infra.

47. 9 N.Y.2d at 881, 175 N.E.2d at 827-28, 216 N.Y.S.2d at 698.

48. Id. Judge Dye, in dissent, cited decisions in other state courts favorable to claimants and stated that he did not think the issues should be avoided: "There is no good reason for postponing decision of the clear-cut and important question posed by this case, that is, whether compensation is payable for a mental injury precipitated by a mental cause without physical impact." Id. at 882, 175 N.E.2d at 828, 216 N.Y.S.2d at 698 (Dye, J., dissenting).

49. 17 App. Div. 2d 998, 233 N.Y.S.2d 893 (3d Dep't 1962). See note 44 supra.

50. The evidence presented as to causation was conflicting. Id. at 998, 233 N.Y.S.2d at 894; see note 57 infra.

51. 12 N.Y.2d 647 (1963).

52. See, e.g., Comment, Mental Stress and Mental Injury in New York Workmen's Compensation, 16 Buffalo L. Rev. 727, 738-39 (1967); Comment, Mental Stimulus and Disability Under Workmen's Compensation, 17 Wash. & Lee L. Rev. 260, 266-67 (1960); 35 Notre Dame Law. 471 (1960); see text accompanying note 53 infra.

53. 1 Larson, supra note 9, § 42.23, at 7-380 to -381.

54. See 36 N.Y.2d at 509, 513, 330 N.E.2d at 603, 608, 369 N.Y.S.2d at 640, 644 (majority opinion and Breitel, C.J., dissenting).

policies of tort and workmen's compensation; the former is intended to compensate for loss on the basis of fault and the latter was "designed to shift the risk of loss of earning capacity caused by industrial accidents from the worker to industry and ultimately the consumer."[55] To implement the policy of workmen's compensation, the court reasoned, the Workmen's Compensation Law should be construed liberally in favor of the employee.[56]

The court observed that the relevant testimony as to the cause of the claimant's mental breakdown was uncontroverted,[57] and observed that the facts clearly showed no physical impact was involved.[58] It then concluded that a "mental-mental" injury could be said to be "accidental"[59] under the Workmen's Compensation Law, noting that in any given injury-producing situation one person may suffer a physical injury, such as a heart attack, while another may suffer a depressive reaction. The determinative factor is the physical makeup of the individual and his particular vulnerability. In each case, however, the individual is equally incapable of functioning properly and should, given the other requisites for recovery, be compensated under the Workmen's Compensation Law.[60]

The court then disposed of the argument that testimony regarding psychological causation and psychological injury is unreliable. Since it had already rejected this argument in recognizing recovery for "mental-physical"[61]

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55. Id. at 508, 330 N.E.2d at 605, 369 N.Y.S.2d at 640.

56. Id. The court cited Heitz v. Jacob Ruppert, 218 N.Y. 148, 112 N.E. 750 (1916) as authority for this proposition. In reaching this liberal interpretation the court felt a guideline could be developed from Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950). The Masse court stated that a court should determine whether a given incident is an "accident" under the Workmen's Compensation Law not by any legal definition, but by "the common sense viewpoint of the average man." Id. at 37, 92 N.E.2d at 57. Arguably this concept is in potential conflict with the "substantial evidence" rule, note 21 supra, since the "average man" will normally look to the facts and to the credibility of the claimant so as to do justice in the individual case. Thus, while the "substantial evidence" rule purports to prevent a court's placing its interpretation of the facts above that of the board, this door is left slightly ajar by the "common man" approach which permits the court to take cognizance of the facts in making its determination of the law.

The standard of doing justice in the individual case, which the court in Masse appeared to adopt, has led to a multitude of decisions which provide few hints as to their theoretical basis of law. Larson has stated that "it is characteristic of compensation law in New York that it is built up largely not by long opinions of the Court of Appeals analyzing and coordinating controversial legal principles, but by hundreds of memorandum opinions dealing with the facts of particular cases. These must be carefully pieced together in a sort of mosaic, before the pattern is discernible." Larson, The Positional-Risk Doctrine in Workmen's Compensation, 1973 Duke L.J. 761, 776.

57. See statement of facts preceding note 1, supra. Arguably, this fact was a key element in the court's finding for the claimant. In both Chernin and Straws there were substantial disputes as to causation. See notes 46 and 50 supra. Query, did the court handle this case differently from Chernin and Straws because it felt that the claimant in Wolfe was deserving, and the claimants in Chernin and Straws weren't? See note 56 supra.

58. 36 N.Y.2d at 508-09, 330 N.E.2d at 605, 369 N.Y.S.2d at 640.

59. This is a threshold legal question on the issue of compensability of an injury in workmen's compensation. See note 14 supra.

60. 36 N.Y.2d at 510, 330 N.E. at 606, 369 N.Y.S.2d at 641.

61. See text accompanying notes 29-37 supra.

and "physical-mental"[62] injuries, the court was prepared to extend its reasoning in those situations to "mental-mental" injuries.[63] This extension, the court observed, would bring New York law into conformity with a majority of other jurisdictions.[64]

Finally, the court approached the issue of whether recovery should be allowed for a mental injury to a "third party" or "innocent bystander."[65] The court recited the policy argument against applying tort concepts to workmen's compensation law.[66] Rather than applying this policy, however, it effectively sidestepped the legal issue by holding that *as a matter of fact* the claimant was not a "third party," but was an "active participant."[67] However, the court cautioned that "[t]his is not to say that liability should be extended indefinitely, we must consider the record before us in light of the common sense viewpoint of the average man."[68]

The dissent in *Wolfe* did not disagree with the concept of recovery in "mental-mental" cases,[69] but felt that a line had to be drawn, disallowing recovery for purely mental injuries to third persons.[70] The dissent felt that this limitation, similar to the one drawn in tort law in *Tobin v. Grossman,*[71] was necessary to avoid "overburdening of the compensation system by injudicious and open-ended expansion of compensation benefits . . . ."[72] This undue expansion would result, the dissent believed, if recoveries were allowed in "a myriad of commonplace occupational pursuits where employees are often exposed to the misfortunes of others which may in the mentally unstable evoke precisely the symptoms which the claimant [in *Wolfe*] suffered."[73] Workmen's compensation law did not require this type of expansion, so the dissent argued, because disability benefits covering such injuries are available today, while such

62. See text accompanying notes 21-25 supra.

63. 36 N.Y.2d at 510, 330 N.E.2d at 606, 369 N.Y.S.2d at 642. In buttressing its argument the court cited Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), which rejected the physical contact rule in tort law. Even though the court previously had distinguished tort law from workmen's compensation law, see text accompanying note 55 supra, it seemed to find the urge to analogize to tort law irresistible.

64. 36 N.Y.2d at 510-11, 330 N.E.2d at 606, 369 N.Y.S.2d at 642. See note 42 supra.

65. 36 N.Y.2d at 511, 330 N.E.2d at 606, 369 N.Y.S.2d at 642. This concept, which is another importation from tort law, see note 71 infra, was the main point of the dissent in Wolfe. See text accompanying notes 69-74 infra.

66. 36 N.Y.2d at 511, 330 N.E.2d at 606, 369 N.Y.S.2d at 642.

67. Id. Thus while the court decided the "mental-mental" issue which it had left open in Chernin and Straws, it left open another issue—that of third party recovery.

68. 36 N.Y.2d at 511, 330 N.E.2d at 607, 369 N.Y.S.2d at 642.

69. Id. (Breitel, C.J., dissenting).

70. Id. at 512, 330 N.E.2d at 607, 369 N.Y.S.2d at 643 (Breitel, C.J., dissenting).

71. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). In Tobin the court denied recovery to a mother who suffered mental anguish after rushing to the scene of an accident in which her child had been injured by a negligent driver. The court felt it necessary to reach this result because of its responsibility "to limit the legal consequences of wrongs to a controllable degree." Id. at 619, 249 N.E.2d at 424, 301 N.Y.S.2d at 561.

72. 36 N.Y.2d at 513, 330 N.E.2d at 608, 369 N.Y.S.2d at 644 (Breitel, C.J., dissenting).

73. Id.

benefits did not exist when workmen's compensation was first enacted.[74]

The dissent seemed to ignore the fact that the number of such recoveries under workmen's compensation could be kept within reasonable bounds by the application of the case-by-case approach which the majority espoused.[75] This approach would avoid the necessity of drawing narrow lines based on legal fictions, a concept foreign to the philosophy of workmen's compensation.[76]

The decision in *Wolfe* might best be viewed as a continuation of the "average man" standard, geared toward achieving justice in the individual case, rather than as another major theoretical break with the fast-dying "contact rule." Similarly, in future cases with fact patterns analogous to those in *Wolfe, Chernin* and *Straws,* it seems unlikely that any theoretical breakthroughs will occur. It appears that future legal battles will be fought over the issue of "third party recovery." The decisions, however, will in all likelihood reflect the case-by-case analysis which is characteristic of the "average man" standard.[77] If, therefore, a claimant reaches the court of appeals with a weak factual case, the court may refuse to decide the legal issue as long as it considers the *result* reached below to be satisfactory. Arguably, then, the battles might be won or lost on the record of the workmen's compensation board.

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74. Id.

75. See text accompanying note 68 supra.

76. "The law should not discard one fiction—the duality between body and mind—only to supplant it by another." Todd v. Goostree, 493 S.W.2d 411, 421 (Mo. App. 1973). Here, the new legal fiction urged by the dissent in Wolfe, would be that there is a substantive difference between "innocent bystanders" and "active participants," which difference, of itself, precludes recovery by innocent bystanders.

77. See note 56 supra.